W. P. M. Kennedy.
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SUPERSTITION AND FORCE.

ESSAYS ON

THE WAGER OF LAW—THE WAGER OF BATTLE—
THE ORDEAL—TORTURE.

BY

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Plurima est et in omni jure civili, et in pontificum libris, et in XII. tabulis, antiquitatis effigies.—CICERO, *de Oratore I. 43.*

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PREFACE.

THE history of jurisprudence is the history of civilization. The labors of the lawgiver embody not only the manners and customs of his time, but also its innermost thoughts and beliefs, laid bare for our examination with a frankness that admits of no concealment. These afford the surest outlines for a trustworthy picture of the past, of which the details are supplied by the records of the chronicler.

It is from these sources that I have attempted, in the present work, a brief investigation into the group of laws and customs through which our forefathers sought to discover hidden truth when disputed between man and man. Not only do these throw light upon the progress of human development from primitive savagism to civilized enlightenment, but they bring into view some of the strangest mysteries of the human mind.

In this edition I have endeavored to indicate, more clearly than before, the source, in prehistoric antiquity, of some of the superstitions which are only even now slowly dying out among us, and which ever and anon

reassert themselves under the thin varnish of our modern rationalism.

In a greatly condensed form the first three essays originally appeared in the North American Review.

June, 1878.

Although in the revision of this volume for a fourth edition there has not been found much to alter, considerable additions have been made which render the survey of the subject more complete. In revising the essays on the Wager of Battle and the Ordeal I have had the advantage of the labors of two recent writers, Dr. Patetta, whose "Le Ordalie" is an extended and philosophical investigation into the whole topic of the Judgments of God, and George Neilson, Esq., whose "Trial by Combat" is a complete account, from the original sources, of the history of the judicial duel in Great Britain. Mr. Neilson has also had the courtesy to communicate to me the results of his further studies of the subject. I therefore indulge the hope that the present edition will be found more worthy of the favor with which the work has been received.

PHILADELPHIA, October, 1892.

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I.

THE WAGER OF LAW.

CHAPTER I.

RESPONSIBILITY OF THE KINDRED.

The conception of crime as a wrong committed against society is too abstract to find expression in the institutions of uncivilized communities. The slayer or the spoiler is an enemy, not of his fellows in general, but only of the sufferer or of his kindred; and if society can provide means for the wronged to exact reparation, it has done its duty to the utmost, and has, indeed, made a notable advance on the path that leads from barbarism to civilization. How recent has been our progress beyond this stage of development is illustrated in the provisions of a code granted so lately as 1231 by the Abbey of St. Bertin to the town of Arques. By these laws, when a man was convicted of intentional homicide, he was handed over to the family of the murdered person, to be slain by them in turn.[1] It still was vengeance, and not justice, that was to be satisfied.

In early times, therefore, the wrong-doer owed no satisfaction to the law or to the state, but only to the injured party. That injured party, moreover, was not a mere individual. All the races of the great Aryan branch of mankind have developed through a common plan of organization, in which each family —sometimes merely the circle of near kindred, at others enlarged into a *gens* or sept—was a unit with respect to the other

[1] Legg. Villæ de Arkes § xxviii. (D'Achery Spicileg. III. 608).

similar aggregations in the tribe or nation, presenting, with respect to personal rights, features analogous to their communal holding of land.[1] Within these units, as a general rule, each individual was personally answerable for all, and all were answerable for each. A characteristic incident of this system was the *wer-gild* or blood-money, through which offences were condoned and the aggrieved were satisfied by a payment made, when the crime was homicide, to the kindred of the slain, and generally contributed by the kindred of the slayer.

The fragments of the Avesta are the earliest records of Aryan legislation that have reached us, and in them we find distinctly marked evidence of this common responsibility of the kindred.[2] Among the Hindus, the ancient code, known as the Manava Dharma Sastra, represents a highly complex social organization, in which primitive institutions have been completely overlaid by the later and antagonistic elements of caste and Brahmanism, but yet it reveals the existence of village communities which were a direct development of the primal system of the family;[3] and the ancient solidarity of these communities is shown in the provision that if a murder or robbery could not be traced, the village in which it occurred was obliged to make it good, or that to which the track of the offender could be followed.[4] In the adventures of the Kauravas and Pandavas, moreover, the Mahabharata preserves fragments of traditions conveying some indications of a pre-existing solidarity among kindred.[5] Much more clearly defined were the Hellenic

[1] See Pictet, Origines Indo-Européennes (Paris, 1878, T. II. pp. 372–6; T. III. pp. 5–8), for the philological evidence of the development of society from the family in all the Aryan nations.

[2] Vendidad, Farg. IV. 24–35 (Bleeck's Translation, Hertford, 1864, pp. 30–1).

[3] Manava Dharma Sastra, VIII. 295 sqq. Comp. Maine's Ancient Law, pp. 260 sqq.

[4] Yajnavalkya, II. 272 (Stenzler's Translation).

[5] Even among the remnants of the pre-Aryan races of India the same customs are traceable. Early in the present century Lieutenant Shaw described the hill-tribes of Rajmahal, to the north of Bengal, as recognizing

organizations of the *patræ* and *phratriæ;* while the institution of the *wer-gild* is seen in the wages earned by Heracles in serving Omphale, to be paid to the kinsmen of the murdered Iphitus; and its existence can be traced to historic times in the payments provided by the Trallian laws to the families of the subject Leleges and Minyans who might be slain. Sir Henry Maine has acutely suggested, also, that the belief in an hereditary curse, which plays so awful a part in Grecian legend, is derived from the primal idea of the solidarity of the family group.[1] In Rome, notwithstanding the powerful Latin tendency to absorb all minor subdivisions into the state, the institution of the *gens*, and the relationship between the patron and his clients, bear striking analogies to the organizations which we find among the Teutonic tribes as they emerge into history; while the fine imposed on the elder Horatius, to expiate for his son the crime of slaying his sister, shows a remnant still existing of the *wer-gild* levied on the relatives.[2] The early legislation of the Celts, both in the Irish and Welsh tribes, as we shall presently see, carried the solidarity of the family to its highest point of development. The same institutions form a prominent feature of social organization among the Slavs. The Russian Mir, or communal society, is evidently a development of the original family; while the Ruskaia Prawda, the earliest extant code, promulgated by Yaroslav Vladomirovich in the eleventh century, allows the relatives of a murdered man either to kill the murderer or to accept a *wer-gild* from him. The district, moreover, in which a homicide occurs is

the responsibility of the injurer to the injured; compensation was assessed at the pleasure of the complainant, and the kindred of the offender were compelled to contribute to it, exactly as among the barbarians who occupied Europe (Asiatic Researches, Vol. IV.).

[1] Dicæarchi Frag. (Didot, Frag. Hist. Græcor.).—Apollodor. Biblioth. II. vi. 2-3.—Diodor. Siculi IV. 31.—Plut. Quæst. Græc. 46.—Maine's Ancient Law, p. 127.

[2] Tit. Liv. I. 26; V. 32.—Appiani de Bell. Hannibal. xxviii.—Dion. Halicar. II. 10; XIII. 5.

liable to a fine, unless the victim is an unknown stranger: as such, there are none to claim compensation for him, he is outside of all family organization, and the law has no protection for him.[1] In Poland, the laws in force until the close of the fifteenth century provided no other penalty for murder than a *wer-gild* to be divided among the kindred and friends of the slain; and during the fifteenth century there was only a short term of imprisonment added.[2] Among the southern Slavs the Zadruga takes the place of the Russian Mir, and is a still more absolute and primitive form of family organization.[3]

In obedience to this all-pervading tendency of organization, the barbarian tribes which overthrew the Roman Empire based their institutions on two general principles—the independence of the individual freeman and the solidarity of the family group—and on these were founded their simple forms of jurisprudence. As the criminal was not responsible to the state, but to the injured party, personal punishments were unknown, and the law made no attempt to decree them. All that it could do was to provide rude courts before which a plaintiff could state his case, and a settled tariff of pecuniary compensation to console him for his sufferings.[4] If he disdained this peaceful process, he was at liberty to assemble his kindred and friends, and exact what satisfaction he could with sword and axe. The offender, moreover, could not legitimately refuse to appear when summoned before the *mallum*, or judicial assembly of the tribe; nor could he, as a rule, claim the right of

[1] Esneaux, Hist. de Russie, I. 172 sqq.

[2] Jo. Herburti de Fulstin Statut. Reg. Polon. tit. *Homicid.* (Samoscii, 1597, pp. 200 sqq.). In cases, however, of homicide committed by a *kmetho*, or serf, upon another, a portion of the *wer-gild* was paid to the magistrate.

[3] See an abstract of Bojisic's work on the customs of the southern Slavs, in the "Penn Monthly" Magazine, Phi'a, Jan. 1878, pp. 15 sqq.

[4] Gradually, however, a portion of the composition money was attributed, under the name of *fredum*, to the king or the magistrate, as a compensation for readmitting the criminal to the public peace.

armed defence, if the complainant preferred to receive the money payment provided for the offence of which he might prove his antagonist guilty.

This *wer-gild* was in no sense a fine inflicted as a punishment for guilt, but only a compensation to induce the injured party to forego his right of reprisals, and the interest which society felt in it was not in the repression of crime, but in the maintenance of peace by averting the endless warfare of hostile families. An Anglo-Saxon proverb, quoted approvingly in the laws of Edward the Confessor, as collected by William the Conqueror, says: "Bicge spere of side oðer bere"—Buy off the spear from thy side or endure it.[1] The application of the system is to be seen in the minute and complex tariffs of crime which form so large a portion of the barbarian codes. Every attempt against person and property is rated at its appropriate price, from the theft of a sucking pig to the armed occupation of an estate, and from a wound of the little finger to the most atrocious of parricides. To what extent this at last was carried may be seen in the Welsh codes, where every hair of the eyelash is rated at a penny.[2]

This system introduced into legal proceedings a commercial spirit which seems strangely at variance with the savage heroism commonly attributed to our barbarian ancestors. In the translation by Mr. Dasent of the old Icelandic Saga of Burnt Njal is vividly set forth the complex procedure which arose from the development of these principles, whereby suits could be sold and assigned by one party to another, and a plaintiff with a promising claim for damages would part with it to some speculator who undertook the chances of the suit; or, if the prospects were not encouraging, he would pay some shrewd lawyer or mighty warrior to prosecute it in his stead. As either party in the primitive Icelandic code could at any

[1] Ll. Edwardi c. xii. (Thorpe's Ancient Laws, I. 467).

[2] Gwentian Code, Bk. II. chap. vii. § 8. (Aneurin Owen's Ancient Laws, etc. of Wales, I. 701.)

moment interrupt the proceedings with a challenge to single combat, or a powerful pleader might collect his friends for a raid on the Althing, and thus break up the court, this traffic in suits was a speculation well fitted to vary the monotony of a sea-rover's life on shore.

In the application of this principle of compensation the solidarity of the family bore a part as conspicuous as in the alternative of private warfare. The kindred of the offender were obliged to contribute shares proportionate to their degrees of relationship; while those of the man who was wronged received respective percentages calculated on the same basis. Thus the most ancient Barbarian code that has reached us—that of the Feini, or primitive Irish—in a fanciful quadripartite enumeration of the principles in force in levying fines, alludes to the responsibility of kindred—"And because there are four things for which it is levied: 'cin' (one's own crime), and 'tobhach' (the crime of a near kinsman), 'saighi' (the crime of a middle kinsman), and the crime of a kinsman in general."[1] A very complete example of the development of this system is to be found in the Icelandic legislation of the twelfth century, where the fines exacted diminish gradually, as far as the relatives in the fifth degree on both sides, each grade of the criminal's family paying its rate to the corresponding grade of the sufferer's kindred.[2] When, however, the next of kin were females, and were thus incompetent to prosecute for murder, the person who undertook that office was rewarded with one-third of the fine.[3] It was not until about 1270 that King Haco, in his unsuccessful attempt to reform these laws, ventured to decree that in cases of murder the blood-money should not be divided among the family of the victim, but should all be paid to the heir.[4] On the other hand, in Denmark, Eric VII., in 1269, relieved the kindred of the murderer

[1] Senchus Mor, I. 259 (Hancock's ed. Dublin, 1865).

[2] Grágás, Sect. IV.-cap. cxiv. [3] Ibid. Sect. VIII. cap. lv.

[4] Jarnsida, Mannhelge, cap. xxix.—Cf. Legg. Gulathingenses, Mannhelgi, cap. xii.

from contributing to the *wer-gild*, although it continued to be divided among the relatives of the slain.[1]

Among the Welsh the provisions for levying and distributing the fines were almost as complex as those of the early Icelandic law, one body of jurisprudence extending the liability even as far as sixth cousins;[2] and perhaps the quaintest expression of the responsibility of the kindred is to be found in the regulation that if any one should draw blood from the abbot of either of the seven great houses of Dyved, the offender should forfeit seven pounds, while a female of his kindred should become a washerwoman in token of disgrace.[3] The firm hold which this practical solidarity of the family had upon the jurisprudence of the European races is shown by a clause in the statutes of the city of Lille, as late as the fourteenth century, where the malefactor had the right to collect from his relatives a portion of the *wer-gild* which he had incurred; and elaborate tables were drawn up, showing the amount payable by each relative in proportion to his degree of kinship, the liability extending as far as to third cousins.[4] A still more pregnant example of the responsibility of kindred is found in the customs of Aspres, in 1184, where the kindred of a homicide, if they would abjure him by oath on relics, were entitled to the public peace; but, if they refused to do so, it became the duty of the Count of Hainault, the Abbot of St. Vaast, and the relatives of the slain, to hunt them down, and seize all their property.[5]

The introduction of Christianity, with the all-pervading sacerdotalism of the church, rendered necessary an innovation on the primeval form of social organization, for ecclesiastical ties dissolved those of the family. By the Carlovingian

[1] Constit. Eric. Ann. 1269 § vii. (Ludewig, Reliq. MSS. T. XII. p. 204).

[2] Dimetian Code, Bk. II. ch. i. §§ 17–31.—Bk. III. ch. iii. § 4.—Anomalous Laws, Bk. IV. ch. iii. § 11.

[3] Dimetian Code, Bk. II. chap. xxiv. § 12.

[4] Roisin, Franchises, etc. de la ville de Lille, pp. 106–7.

[5] Charta Balduini Hannoniens. (Martene, Collect. Ampliss. I. 964.)

legislation, when a priest was slain his *wer-gild* was paid to the church, which was held to be nearer to him than any relative,[1] though this regulation subsequently was modified so as to divide the composition into three parts, of which one was paid to the church of the deceased, one to his bishop, and the third to his kindred.[2] As a general rule, therefore, the clerk could claim no share of the blood-money collected for the murder of his kinsmen, nor be called upon to contribute to that incurred by his family;[3] though it is true that, by the Welsh laws of Hoel the Good, compiled in the tenth century, children, even prospective, were a link through which the liability might be again incurred. "Neither clerks nor women are to have a share of the *galanas*, since they are not avengers; however, they are to pay for their children or to make oath that they shall never have any."[4]

With this exception, therefore, in its relations to the community, each family in the barbaric tribes was a unit, both for attack and defence, whether recourse was had to the jealously preserved right of private warfare, or whether the injured parties contented themselves with the more peaceful processes of the *mallum* or *althing*. This solidarity of the kindred is the key to much that would otherwise appear irrational in their legislation, and left, as we have seen, its traces late in the customary law.

[1] Capitul. Lib. IV. cap. 15. [2] Concil. Tribur. an. 895, can. iv.
[3] Dimetian Code, Bk. II. chap. i. § 32.
[4] Venedotian Code, Bk. III. chap. i. § 21.

CHAPTER II.

THE OATH AND ITS ACCESSORIES.

BETWEEN the commission of an offence and its proof in a court of justice there lies a wide field for the exercise or perversion of human ingenuity. The subject of evidence is one which has taxed man's reasoning powers to the utmost; and the subtle distinctions of the Roman law, with its *probatio*, *præsumptio juris*, *præsumptio juris tantum:* the endless refinements of the glossators, rating evidence in its different grades, as *probatio optima*, *evidentissima*, *apertissima*, *legitima*, *sufficiens*, *indubitata*, *dilucida*, *liquida*, *evidens*, *perspicua*, and *semiplena;* and the artificial rules of the common law, so repugnant frequently to human common sense, all alike show the importance of the subject, and its supreme difficulty. The semi-barbarian, impatient of such expenditure of logic, arrived at results by a shorter process.

The time has passed for the romantic school of writers who assume that the unsupported oath of the accused was originally sufficient to clear him of a charge, when the fierce warrior disdained to shrink from the consequences of his act. It was not, indeed, until long after the Teutonic tribes had declined from the assumed virtues of their native forests, that an unsupported oath was receivable as evidence, and the introduction of such a custom may be traced to the influence of the Roman law, in which the importance of the oath was overwhelming.[1]

[1] The oath may be regarded as the foundation of Roman legal procedure —"Dato jurejurando non aliud quæritur, quam an juratum sit; remissa quæstione an debeatur; quasi satis probatum sit jurejurando"—L. 5, § 2, D. XII. ii. The *jusjurandum necessarium* could always be administered by the judge in cases of deficient evidence, and the *jusjurandum in jure* proffered by the plaintiff to the defendant was conclusive: "Manifestæ tur-

The Wisigoths, who moulded their laws on the Roman jurisprudence, were the only race of barbarians who permitted the accused, in the absence of definite testimony, to escape on his single oath,[1] and this exception only tends to prove the rule, for at the council of Valence, in 855, the Wisigothic custom was denounced in the strongest terms as an incentive to perjury.[2] It is true that the oath of a master could clear a slave accused of certain crimes,[3] which was no less an incentive to perjury, for the master was liable in case of conviction, but presumably in such case he took upon himself the responsibility and laid himself open to an accusation of perjury. As a rule, however, we may assume that the purgatorial power of a single oath was an innovation introduced by the church, which was trained in the Roman institutions and claimed for its members the privilege, when testimony was deficient, of clearing themselves by appealing in this manner to God.[4] Continued contact with the remains of Roman civilization strengthened the custom, and its development was to a great extent due to the revival of the study of the imperial jurisprudence in the twelfth century.[5] The primitive principle is well

pitudinis et confessionis est nolle nec jurare nec jusjurandum referre"—Ibid. l. 38.

[1] Ll. Wisigoth. Lib. II. Tit. ii. c. 5.

[2] Concil. Valentin. ann. 855, c. xi.

[3] Ll. Ripuar. Tit. XII. § 1; ix. 17.—Capit. Ludov. Pii. ann. 819 add. ad L. Salicam, c. 15.—Capitul. L. IV. c. 29.—Ivonis Decr. XVI. 239.

[4] De presbytero vero, si quilibet sacerdos a populo fuerit accusatus, si certi non fuerint testes qui criminis illati approbent veritatem, jusjurandum erit in medio, et illum testem proferat de innocentiæ suæ puritate cui nuda et aperta sunt omnia; sicque maneat in proprio gradu.—Gregor. PP. II. Epist. XIV. ad Bonifacium. Cf. Hincmari Remens. Epist. XXII.

[5] Thus Alfonso the Wise endeavored to introduce into Spain the mutual challenging of the parties involved in the Roman *jusjurandum in jure*, by his *jura de juicio* (Las Siete Partidas, P. III. Tit. xi. l. 2. Cf. Espéculo, Lib. V. Tit. xi. ley 2). Oddly enough, the same procedure is found incorporated in the municipal law of Rheims in the fourteenth century, probably introduced by some over-zealous civilian; "Si alicui deferatur jusjurandum,

expressed in the Frisian code, where the pleader says, "I swear alone, if thou darest, deny my oath and fight me,"[1]

necesse habet jurare vel referre jusjurandum, et hoc super quovis debito, vel inter quasvis personas"—Lib. Pract. de Consuetud. Remens. § 15 (Archives Législat. de Reims, P. I. p. 37). By this time, however, the oaths of parties had assumed great importance. In the legislation of St. Louis, they occupy a position which was a direct incentive to perjury. Thus he provides for the hanging of the owner of a beast which had killed a man, if he was foolish enough not to swear that he was ignorant of its being vicious. "Et si il estoit si fox que il deist que il seust la teche de la beste, il en seroit pendus pour la recoignoissance"—Établissements, Liv. I. chap. cxxi.

A charter granted to the commune of Lorris, in 1155, by Louis le Jeune, gives to burghers the privilege of rebutting by oath, without conjurators, an accusation unsupported by testimony—Chart. Ludovic. junior. ann. 1155, cap. xxxii. (Isambert, Anciennes Lois Françaises I. 157.) And, in comparatively modern times, in Germany, the same rule was followed. "Juramento rei, quod purgationis vocatur, sæpe etiam innocentia, utpote quæ in anima constitit, probatur et indicia diluuntur;" and this oath was administered when the evidence was insufficient to justify torture. (Zangeri Tract. de Quæstionibus, cap. iii. No. 46.) In 1592, Zanger wrote an elaborate essay to prove the evils of the custom.

It is a noteworthy fact, however, that of all the medieval codes the one least affected by the influence of the Roman law was the Saxon, and in this the purgatorial power of the oath was admitted to a degree unknown elsewhere. The accused was allowed in certain cases to clear himself, however notorious were the facts, and no evidence was admitted to disprove his position, unless it were a question of theft, and the stolen articles were found in his possession, or he had suffered a previous conviction. (Jur. Provin. Saxon. Lib. I. Art. 15, 18, 39; Lib. II. Art. 4, 72.) Even this was an improvement on the previous custom, if we may believe Cardinal Henry of Susa, who denounces the practice in Saxony and Dacia, where a man can clear himself, even if he holds the stolen article in his hand and the loser has ample witnesses present (Hostiensis Aureæ Summæ Lib. v. De Purg. canon. § 3). This irrational abuse was long in vogue, and was denounced by the council of Bâle in the fifteenth century (Schilter. Thesaur. II. 291). It only prevailed in the north of Germany; the Jus

[1] "Ego solus jurare volo, tu, si audes, nega sacramentum meum et armis mecum contende."—Ll. Ripuar. Tit. IX. § 3.

where the oath is only the preliminary to proof by the judgment of God.

The exceptions to this in the early legislation of the barbarians are merely special immunities bestowed on rank. Thus in one of the most primitive of the Anglo-Saxon codes, which dates from the seventh century, the king and the bishop are permitted to rebut an accusation with their simple asseveration, and the thane and the mass-priest with a simple oath, while the great body both of clerks and laymen are forced to clear themselves by undergoing the regular form of canonical compurgation which will be hereafter described.[1] So, in the Welsh legislation, exemption from the oath of absolution was accorded to bishops, lords, the deaf, the dumb, men of a different language, and pregnant women.[2] Instances of class-privileges such as these may be traced throughout the whole period of the dark ages, and prove nothing except the advantages claimed and enjoyed by caste. Thus, by the law of Southern Germany, the unsupported oath of a claimant was sufficient, if he were a person of substance and repute, while, if otherwise, he was obliged to provide two conjurators,[3] and in Castile, the *fijodalgo*, or noble, could rebut a claim in civil cases by taking three solemn oaths, in which he invoked on himself the vengeance of God in this world and the next.[4]

So far, indeed, were the Barbarians from reposing implicit confidence in the integrity of their fellows that their earliest records show how fully they shared in the common desire of

Provin. Alaman. (cap. ccclxxxi. § 3), which regulated Southern Germany, alludes to it as one of the distinguishing features of the Saxon code.

So, also, at the same period a special privilege was claimed by the inhabitants of Franconia, in virtue of which a murderer was allowed to rebut with his single oath all testimony as to his guilt, unless he chanced to be caught with the red hand—Jur. Provin. Alaman. cap. cvi. § 7.

[1] Laws of Wihtræd, cap. 16–21. Comp. Ll. Henrici I. Tit. lxiv. § 8.

[2] Anomalous Laws, Book IV. chap. i. § 11.

[3] Jur. Provin. Alaman. cclxiv. 7, 8.

[4] Fuero Viejo, III. ii.

mankind to place the oath under the most efficient guarantees that ingenuity could devise. In its most simple form the oath is an invocation of some deity or supernatural power to grant or withhold his favor in accordance with the veracity of the swearer, but at all times men have sought to render this more impressive by interposing material objects dear to the individual, which were understood to be offered as pledges or victims for the divine wrath. Thus, among the Hindus, the ancient Manava Dharma Sastra prescribes the oath as satisfactory evidence in default of evidence, but requires it to be duly reinforced—

"In cases where there is no testimony, and the judge cannot decide upon which side lies the truth, he can determine it fully by administering the oath.

"Oaths were sworn by the seven Maharshis, and by the gods, to make doubtful things manifest, and even Vasishtha sware an oath before the king Sudama, son of Piyavana, when Viswamitra accused him of eating a hundred children.

"Let not the wise man take an oath in vain, even for things of little weight; for he who takes an oath in vain is lost in this world and the next.

"Let the judge swear the Brahman by his truth; the Kshatriya by his horses, his elephants, or his arms; the Vaisya by his cows, his corn, and his gold; the Sudra by all crimes."[1]

And in the more detailed code of Vishnu there is an exceedingly complicated system of objects to be sworn upon, varying with the amount at stake and the caste of the swearer.[2]

[1] Book VII. 109–13 (after Delongchamps' translation).

The corresponding passage in the Institutes of Vishnu (VIII. 20–3) renders this somewhat more intelligible. When the judge swears the witness—

"A Brahmana he must address thus, 'Declare.'

"A Kshatriya he must address thus, 'Declare the truth.'

"A Vaisya he must address thus, 'Thy kine, grain, and gold (shall yield thee no fruit if thou wert to give false evidence).'

"A Sudra he must address thus, 'Thou shalt have to atone for all (possible) heavy crimes (if thou wert to give false evidence).'"

[2] Institutes of Vishnu, IX. (Jolly's Translation).

We see the same custom in Greece, where Homer represents Hera as exculpating herself by an oath on the sacred head of Zeus, and on their marriage-bed, a practice which mortals imitated by swearing on the heads of their children, or on that of their patron, or of the king.[1] Under the Roman law, oaths were frequently taken on the head of the litigant, or on those of his children.[2] The Norse warrior was sworn, like the Hindu Kshatriya, on his warlike gear:

"Oaths shalt thou
First to me swear,
By board of ship,
By rim of shield,
By shoulder of steed,
By edge of sword,
That thou wilt not slay
The wife of Volund,
Nor of my bride
Cause the death."[3]

When these material pledges were not offered, the sanctions of religion have in all ages been called into play to impress the imagination of the swearer with the awful responsibility incurred, the presence of the deity being obtained by the offer of a sacrifice, or his interposition being assured by the use of some object of peculiar sacredness. In Deuteronomy, when the corpse of a murdered man was found, the elders of the nearest city disculpated themselves and their fellow-citizens before the Levites over the body of a heifer slain for the purpose.[4] We see the same principle applied to promissory oaths in the horse which Tyndareus sacrificed and buried when he exacted from the suitors of Helen the oath that they would accede to her choice of a bridegroom and defend her and her husband against all comers;[5] and it is only necessary

[1] Iliad. xv. 36-40.—Luciani Philopseud. 5; Cataplus 11.

[2] Ll. 3, 4, D. xii. ii.

[3] Volundarkvida 31 (Thorpe's Sæmund's Edda). A curious remnant of this is seen in the burgher law of Northern Germany in the thirteenth century, by which a man reclaiming a stolen horse was bound to kick its left foot with his right foot, while with his left hand he took hold of the animal's ear and swore by its head that it was his.—Sachsisches Weichbild, art. 135.

[4] Deuteron. xxi. 4-8.

[5] Pausan. iii. xx. 9.

to allude to the well-known Ara Maxima of Hercules in Rome to show the prevalence of the same customs among the Italiotes. Similar practices were familiar to the Norsemen. Among them the Godi was both priest and judge, the judgment-seat adjoined the temple, and all parties to a suit, including judge and witnesses, were solemnly sworn upon the sacred ring kept for that purpose on the altar. It was sprinkled with the blood of a sacrificial bull, and then the oath was taken by invoking Freyr and Niord, and the almighty As to help the swearer as he should maintain truth and justice.[1] Yet so little did all these precautions serve to curb the untruthfulness of the cunning sea-kings that in Viga-Glums Saga we find Glum denying a charge of murder by an oath taken in three temples, in which he called Odin to witness in words so craftily framed that while he was in reality confessing his guilt he apparently was denying it most circumstantially.[2]

Similarly in Christian times, the most venerated forms of religion were, from a very early period, called in to lend sanctity to the imprecation, by devices which gave additional solemnity to the awful ceremony. In this the natural tendency of the church to follow the traditional customs of the populations from which its members were drawn was reinforced by the example of the practices of Judaism. The "covenant between the pieces," by which Yahveh confirmed his promises to Abram, and by which the Jews renewed their promises to him, was a sacrificial ceremony of the most impressive character, only to be used on occasions of supreme importance. As soon as a permanent place of worship was provided, the altar in the temple was resorted to by litigants in order that the oath might be taken in the presence of Yahveh himself; and so powerful was the impression of this upon the Christian mind that in the early ages of the church there was a popular

[1] Islands Landnamabok IV. 7; II. 9 (Ed. 1774, pp. 299, 83).

[2] Keyser's Religion of the Northmen, Pennock's Translation, p. 238.

superstition that an oath taken in a Jewish synagogue was more binding and more efficient than one taken elsewhere.[1] These beliefs developed into a great variety of formulas, which would reward an examination more detailed than that which I can give them here.

In the middle of the sixth century, Pope Pelagius I. did not disdain to absolve himself from the charge of having been concerned in the troubles which drove his predecessor Vigilius into exile, by taking a disculpatory oath in the pulpit, holding over his head a crucifix and the gospels;[2] and in the eighth century a priest accused without witnesses to prove his guilt was enabled to absolve himself by placing the cross upon his head and declaring his innocence by the Everlasting God.[3] So, when the holy Gregory of Tours was accused of reproachful words truly spoken of Queen Fredegonda, a council of bishops decided that he should clear himself of the charge by oaths on three altars, after celebrating mass on each, which he duly performed, doubtless more to his corporeal than his spiritual benefit.[4] This plan of reduplicating oaths on different altars was an established practice among the Anglo-Saxons, who, in certain cases, allowed the plaintiff to substantiate his assertion by swearing in four churches, while the defendant could rebut the charge by taking an oath of negation in twelve.[5] Seven altars are similarly specified in the ancient Welsh laws in cases where a surety desired to deny his suretyship;[6] and, according to the *Fleta*, as late as the thirteenth century, a custom was current among merchants of proving the payment

[1] Gen. xv. 9–17.—Jer. xxxiv. 18–19.—I. Kings, viii. 31–2.—Chrysost. Orat. adv. Jud. I. 3.

[2] Anastas. Biblioth. No. LXII.

[3] Ecgberti Dialog. IV. (Haddan and Stubbs's Councils of Great Britain, III. 405).

[4] Gregor. Turon. Hist. Lib. v. cap. xlix. Gregory complains that this was contrary to the canons, of which more hereafter.

[5] Dooms of Alfred, cap. 33.

[6] Dimetian Code, Bk. II. chap. vi. § 17 (Owen, I. 431).

of a debt by swearing in nine churches, the abuse of which led to its abrogation.[1]

The intense veneration with which relics were regarded, however, caused them to be generally adopted as the most effective means of adding security to oaths, and so little respect was felt for the simple oath that, ere long, the adjuncts came to be looked upon as the essential feature, and the imprecation itself to be divested of binding force without them. Thus, in 680, when Ebroin, mayor of the palace of Burgundy, had defeated Martin, Duke of Austrasia, and desired to entice him from his refuge in the stronghold of Laon, two bishops were sent to him bearing the royal reliquaries, on which they swore that his life should be safe. Ebroin, however, had astutely removed the holy remains from their cases in advance, and when he thus got his enemy in his power, he held it but a venial indiscretion to expose Martin to a shameful death.[2] How thoroughly this was in accordance with the ideas of the age is shown by the incorporation, in the canons of the church, of the doctrine that an oath was to be estimated by its externals and not by itself. The penitential of David, dating from the latter half of the sixth century, provides that perjury committed in a church shall be punished by a fine of four times the value of that for which the false oath was taken,[3] but no penalty is provided for false swearing elsewhere. As the theory developed itself this tacit condoning of such perjury was boldly declared to be good ecclesiastical law, and the venerable code of morality which passes under the name of

[1] Fleta, Lib. II. cap. lxiii. § 12. The Moslem jurisprudence has a somewhat similar provision for accusatorial oaths in the Iesameh by which a murderer can be convicted, in the absence of testimony or confession, by fifty oaths sworn by relatives of the victim. Of these there must be at least two, and the fifty oaths are divided between them in proportion to their respective legal shares in the Deeyeh, or blood-money for the murder.—Du Boys, Droit Criminel des Peuples Modernes, I. 269.—Seignette, Code Mussulman, Constantine, 1878, p. lvi.

[2] Fredegarii Chron. cap. xcvii.

[3] Excerpt. de Libro Davidis No. xvi. (Haddan and Stubbs, I. 120).

Theodore Archbishop of Canterbury assumes that a false oath taken on a consecrated cross requires, for absolution, three times the penance necessary in cases where the oath had been taken on an unconsecrated one, while, if the ministration of a priest had not been employed, the oath was void, and no penalty was inflicted for its violation.[1] In a similar mood the penitential known as that of Gregory III. provides that three years' penance will absolve for perjury committed on a consecrated cross or on the hand of a bishop or priest, while seven years are requisite if the oath has been taken on the gospels or on an altar with relics.[2] This rule took its final shape in the canon law, which provides one year's penance for perjury committed on an unconsecrated cross, and three years' for that on a consecrated one, or on the hand of a bishop.[3]

These principles were adopted as the fundamental basis of all legal procedures in Wales. Every prosecution and defence required relics to give validity to the oaths of both parties, and even in the fifteenth century a collection of laws declares that a plaintiff coming into court without a relic on which to make his oath, not only lost his cause, but incurred a fine of nine-score pence. The same tendency is shown in the rule by which a man who suspected another of theft could go to him with a relic, and in the presence of witnesses demand an oath of negation, a failure in which was a conviction of the crime im-

[1] Si in manu episcopi . . . aut in cruce consecrata perjurat III. annos pœniteat. Si vero in cruce non consecrata perjurat, I. annum pœniteat; si autem in manu hominis laici juraverit nihil est.—Theodori Cantuar. Pœnit. cap. xxiv. § 2. (Thorpe, Ancient Laws, vol. II. p. 29.) Cf. Haddan and Stubbs, III. 423; Wasserschleben, Bussordnungen, pp. 190, 226.

[2] Pœnitent. Pseudo-Gregor. III. vii. (Wasserschleben, p. 539).

[3] Pœnitent. Cummeani cap. v. § 3 (Wasserschleben, p. 477).—Gratiani Decr. c. 2. Caus. XXII. Q. v. In the fourteenth century this was repeated in the penitential canons of Astesanus (§ 23), which continued until the Reformation to be a recognized authority in the confessional. Astesanus, however, explains that the obligation is equal to God, but unequal as regards the church, whence the difference in the penance.—Astesani Summa de Casibus Conscientiæ, P. I. Lib. I. Tit. xviii.

puted, without further trial.[1] In the same spirit, ecclesiastical authority was even found to admit that a powerful motive might extenuate the sin of perjury. If committed voluntarily, seven years of penitence were enjoined for its absolution; if involuntarily, sixteen months, while if to preserve life or limb, the offence could be washed out with four months.[2] When such doctrines were received and acted upon, we can hardly wonder at the ingenious device which the sensitive charity of King Robert the Pious imitated from the duplicity of Ebroin, to save the souls of his friends. He provided two reliquaries on which to receive their oaths—one for his magnates, splendidly fabricated of crystal and gold, but entirely empty, the other for the common herd, plainer and enshrining a bird's egg. Knowing in advance that his lieges would be forsworn, he thus piously sought to save them from sin in spite of themselves, and his monkish panegyrist is delighted in recounting this holy deceit.[3]

It was easy, from a belief such as this, to draw the deduction that when an oath was sworn on relics of peculiar sanctity, immediate punishment would follow perjury; and thus it followed that some shrines obtained a reputation which caused them to be resorted to in the settlement of disputed judicial questions. Even as early as St. Augustin there are traces of

[1] Anomalous Laws, Book IX. chap. v. § 3; chap. xxxviii. § 1 (Owen, II. 233, 303). The definition of relics, however, was somewhat vague—"There are three relics to swear by: the staff of a priest; the name of God; and hand to hand with the one sworn to." Bk. XIII. ch. ii. § 219 (Ibid. II. 557).

[2] Regino de Eccles. Discip. Lib. I. cap. ccc. See also Jur. Provin. Saxon, Lib. III. c. 41. Notwithstanding the laxity of these doctrines, it is not to be supposed that the true theory of the oath was altogether lost. St. Isidor of Seville, who was but little anterior to Theodore of Canterbury, well expresses it (Sententt. Lib. II. cap. xxxi. § 8): "Quacunque arte verborum quisque juret, Deus tamen, qui conscientiæ testis est, ita hoc accipit, sicut ille cui juratur intelligit," and this, being adopted in successive collections of canons, coexisted with the above as a maxim of ecclesiastical law (Ivon. Decret. P. XII. c. 36.—Gratian. c. 13, Caus. XXII. Q. ii.).

[3] Helgaldi Vit. Roberti Regis.

such practices, which that Father of the Church not only records, but imitated,[1] and at a later period the legends are numerous which record how the perjured sinner was stricken down senseless or rendered rigid and motionless in the act of swearing falsely.[2] From this point of view oaths were really ordeals, and as such we shall consider them hereafter. At present it suffices to observe that the profit which the church derived from thus administering oaths on relics affords an easy explanation of her teachings, and of the extension of these practices. Their resultant advantages are well illustrated by the example of the holy taper of Cardigan, in Wales. A miraculous image of the Virgin was cast ashore, bearing this taper burning in its hand. A church was built for it, and the taper "contynued styll burnynge the space of nyne yeres, without wastynge, until the tyme that one forsware himselfe thereon, so then it extincted, and never burned after." At the suppression of the house under Henry VIII., the prior, Thomas Hore, testified: "Item, that since the ceasynge of burnynge of the sayd taper, it was enclosed and taken for a greate relyque, and so worshipped and kyssed of pylgremes, and used of men to sweare by in difficill and harde matters, whereof the advauntage admounted to greate sommes of money in tymes passed, payenge yerely to the same XXti nobles for a pencion unto thabbott of Chersey."[3]

In all this Spain would seem to be exceptional. In the thirteenth century the rule is expressed that a pleader must

[1] Augustin. Epist. 78, §§ 2, 3 (Ed. Benedict.).

[2] Gregor. Turon. de Gloria Martyr. cap. 58, 103.

[3] Suppression of Monasteries, p. 186 (Camden Soc. Pub.). The Priory of Cardigan was dependent upon the Abbey of Chertsey, and the sum named was apparently the abbot's share of the annual "alms."

Perhaps the most suggestive illustration of the reverence for relics is a passage in the ancient Welsh laws limiting the protection legally afforded by them—"If a person have relics upon him and does an illegal act under the relics, he is not to have protection or defence through those relics, for he has not deserved it."—Venedotian Code, Bk. I. chap. x. § 7.

take the oath required of him by his antagonist; if he is required to swear by God, it will not suffice for him to swear by some saint, or by his own head. Oaths could indeed be taken on crosses or altars, but they could also be reduced to the simplest asseveration. Thus, there is a provision that if one party says "Swear to me on your simple word," then the reply "know that it is so," or "believe me that it is so," suffices, and has all the force of the most solemn adjuration.[1]

CHAPTER III.

CONJURATORS, OR PARTAKERS IN THE OATH.

NOTWITHSTANDING the earnestness with which these teachings were enforced, it may readily be believed that the wild barbarian, who was clamoring for the restoration of stolen cattle, or the angry relatives, eager to share the *wer-gild* of some murdered kinsman, would scarce submit to be balked of their rights at the cost of simple perjury on the part of the criminal. We have seen that both before and after their conversion to Christianity they had little scruple in defiling the most sacred sanctions of the oath with cunning fraud, and they could repose little confidence in the most elaborate devices which superstition could invent to render perjury more to be dreaded than defeat. It was therefore natural that they should perpetuate an ancestral custom, which had arisen from the structure of their society, and which derived its guarantee from the solidarity of families alluded to above. This was the custom which was subsequently known as canonical compurgation, and which long remained a part of English jurisprudence, under the name of the Wager of Law. The defendant, when denying the allegation under oath,

[1] Espéculo, Lib. v. Tit. xi. leyes 14, 15. The oaths required of Jews and Moors were much more elaborate (Ibid. 16, 17).

appeared surrounded by a number of companions—*juratores*, *conjuratores*, *sacramentales*, *collaudantes*, *compurgatores*, as they were variously termed—who swore, not to their knowledge of the facts, but as sharers and partakers in the oath of denial.

This form of procedure derives importance from the fact that it is an expression of the character, not of an isolated sept, but of nearly all the races that have moulded the destinies of modern Europe. Although unknown to the Roman law, there are traces of it in the ancient Hellenic legislation.[1] The Ostrogoths in Italy, and the Wisigoths of the south of France and Spain were the only nations in whose extant codes it occupies no place, and they, as has already been remarked, at an early period yielded themselves completely to the influence of the Roman civilization.[2] On the other hand, the Salians, the Ripuarians, the Alamanni, the Baioarians, the Lombards, the Frisians, the Norsemen, the Saxons, the Angli and Werini, the Anglo-Saxons, and the Welsh, races whose common origin must be sought in the prehistoric past, all gave to this form of purgation a prominent position in their jurisprudence, and it may be said to have reigned from Southern Italy to Scotland.[3]

The earliest text of the Salic law presents us with the usages of the Franks unaltered by any allusions to Christianity, and it may therefore be presumed to date from a period not later than the conversion of Clovis. In this primitive code there are directions for the employment of conjurators, which show that the procedure was a settled and established form at that period.[4] So in the Frisian law, which, although compiled in

[1] Patetta, Le Ordalie, Torino, 1890, p. 130.

[2] Yet compurgators appear in the Spanish laws of the twelfth century. See Fuero de Balbás, ann. 1135 (Coleccion de Privilegios, etc. Madrid, 1833, T. VI. p. 85).

[3] The primitive Scottish procedure appears to have been based on compurgation.—Neilson's Trial by Combat, London, 1890, p. 78.

[4] First Text of Pardessus, Tit. xxxix. § 2, and Tit. xlii. § 5 (Loi Salique,

the eighth century, still reveals pagan customs and the primitive condition of society, the practice of compurgation evidently forms the basis of judicial proceedings. The Islands Landnamabok also exhibits it as a form of regular procedure among the heathen Norsemen. Although the other codes have only reached us in revisions subsequent to the conversion of the several tribes, still, the universal use of the practice shows that its origin must be traced to a period anterior to the separation of the several races from the original common stock.

The church, with the tact which distinguished her dealings with her new converts, was not long in adopting a system which was admirably suited for her defence in an age of brute force. As holy orders sundered all other ties, and as the church was regarded as one vast family, ecclesiastics speedily arrogated to themselves and obtained the privilege of having men of their own class as compurgators, and, thus fortified for mutual support, they were aided in resisting the oppressors who invaded their rights on every hand. This claim, with all its attendant advantages, was fully conceded when Charlemagne, in the year 800, went to Rome for the purpose of trying Pope Leo III. on a grave charge, and in that august presence the Pontiff, whom no witnesses dared to accuse, cleared himself of the crimes imputed to him by solemnly taking the oath of denial in company with twelve priests as compurgators.[1] Three years afterwards, the Emperor decreed

Paris, 1843, pp. 21, 23). It is somewhat singular that in the subsequent recensions of the code the provision is omitted in these passages.

[1] Eginhard. Annal. ann. 800.—The monkish chroniclers have endeavored to conceal the fact that Leo underwent the form of trial like a common criminal, but the evidence is indubitable. Charlemagne alludes to it in the *Capitularium Aquisgranense* ann. 803, in a manner which admits of no dispute.

The monk of St. Gall (De Gestis B. Carol. Mag. Lib. i. cap. 28), whose work is rather legendary in its character, describes the Pope as swearing to his innocence by his share at the day of judgment in the promises of the gospels, which he had placed upon his head.

that, in all doubtful cases, priests should defend themselves with three, five, or seven ecclesiastical compurgators, and he announced that this decision had been reached by the common consent of pope, patriarchs, bishops, and all the faithful.[1] It is true that a few months later, on being shown a decretal of Gregory II.[2] ordering the clergy to rebut with their single oaths all accusations unsupported by witnesses, he modified his previous command, and left the matter to the discretion of his prelates; but this had no practical result, for Charlemagne's capitulary was adopted in the canon law and ascribed to Leo himself.[3] The custom soon received the papal sanction again in the most solemn manner. In 823, Pope Pascal I. was more than suspected of complicity in the murder of Theodore and Leo, two high dignitaries of the papal court.

[1] Capit. Aquisgran. ann. 803, cap. vii.

[2] Bonifacii Epist. cxxvi.

The subject of the oaths of priests was one of considerable perplexity during the dark ages. Among the numerous privileges assumed by the sacerdotal body was exemption from the necessity of swearing, an exemption which had the justification of the ancient Roman custom; "Sacerdotem, Vestalem, et Flaminem Dialem in omni mea jurisdictione jurare non cogam" (Edict. Perpet. ap. Aul. Gell. x. 15). The effort to obtain the reversion of this privilege dates from an early period, and was sometimes allowed and sometimes rejected by the secular authorities, both as respects promissory, judicial, and exculpatory oaths. The struggle between church and state on this subject is well exemplified in a case which occurred in 1269. The Archbishop of Reims sued a burgher of Chaudardre. When each party had to take the oath, the prelate demanded that his should be taken by his attorney. The defendant demurred to this, alleging that the archbishop had in person presented the complaint. Appeal was made to the Parlement of Paris, which decided that the defendant's logic was correct, and that the personal oath of the prelate was requisite (Olim, I. 765).

In Spain, a bishop appearing in a secular court, either as plaintiff or defendant, was not exempt from the oath, but had the singular privilege of not being compelled to touch the gospels on which he swore.—Siete Partidas, P. III. Tit. xl. l. 24.

[3] Gratian. c. 19, Caus. II. Q. v.

Desirous to avoid an investigation by the commissioners sent by Louis le Débonnaire, he hastily purged himself of the crime in anticipation of their arrival, by an oath taken with a number of bishops as his compurgators;[1] and it is a striking example of the weight accorded to the procedure that, although the assumed fault of the victims had been their devotion to the imperial party, and though the pope had by force of arms prevented any pursuit of the murderers, the emperor was powerless to exact satisfaction, and there was nothing further to be done. Pope Pascal stood before the world an innocent man.

It is true that, in the tenth century, Atto of Vercelli complains bitterly that a perverse generation refused to be satisfied with the single oath of an accused priest, and required him to be surrounded by compurgators of his class, which that indignant sacerdotalist regarded as a grievous wrong.[2] As the priesthood, however, failed in obtaining the entire immunity for which they strove during those turbulent times, the unquestioned advantages which compurgation afforded recommended it to them with constantly increasing force. Forbidden at length to employ the duel in settling their differences, and endeavoring, in the eleventh and twelfth centuries, to obtain exemption from the ordeal, they finally accepted compurgation as the special mode of trial adapted to members of the church, and for a long period we find it recognized as such in all the collections of canons and writings of ecclesiastical jurists.[3] From this fact it obtained its appellation of *purgatio canonica*, or canonical compurgation.

[1] Eginhard. Annal. ann. 823.

[2] Atton. de Pressuris Ecclesiast. P. 1.

[3] Buchardus, Ivo, Gratianus, *passim*.—Ivon. Epist. 74.

CHAPTER IV.

SELECTION OF COMPURGATORS.

As already remarked, the origin of the custom is to be traced to the principle of the unity of families. As the offender could summon his kindred around him to resist an armed attack of the injured party, so he took them with him to the court, to defend him with their oaths. Accordingly, we find that the service was usually performed by the kindred, and in some codes this is even prescribed by law, though not universally.[1] This is well illustrated in the Welsh laws, where the *raith*, or compurgation, was the basis of almost all procedure, and where consequently the system was brought to its fullest perfection. Complicated rules existed as to the proportion of paternal and maternal kindred required in various cases, and the connection between the *wer-gild* and the obligation of swearing in defence of a kinsman was fully

[1] L. Longobard. Lib. II. Tit. xxi. § 9; Tit. lv. § 12.—L. Burgund. Tit. vii.—Laws of Ethelred, Tit. ix. §§ 23, 24.—L. Henrici I. cap. lxxiv. § 1. Feudor. Lib. v. Tit. ii.

This point illustrates the essential distinction between witnesses and compurgators. The Roman law exercised great discrimination in admitting the evidence of a relative to either party in an action (Pauli Sentent. Lib. v. Tit. xv.—Ll. 4, 5, 6, 9. Dig. XXII. v.). The Wisigoths not only adopted this principle, but carried it so far as to exclude the evidence of a kinsman in a cause between his relative and a stranger (L. Wisigoth. Lib. II. Tit. iv. c. 12), which was adopted into the Carlovingian legislation (Benedict. Levit. Capitul. Lib. VI. c. 348) under the strong Romanizing influence which then prevailed. The rule, once established, retained its place through the vicissitudes of the feudal and customary law (Beaumanoir, Coutumes du Beauvoisis, cap. xxxix. § 38.—Cout. de Bretagne, Tit. vii. art. 161, 162). In the ancient Brahmanic legislation the evidence of both friends and enemies was excluded (Institutes of Vishnu, viii. 3).

recognized—"Because the law adjudges the men nearest in worth in every case, excepting where there shall be men under vows to deny murder," therefore the compurgators were required to be those "nearest to obtain his worth if killed."[1] Under these circumstances, the *raithman* could be objected to on the score of not being of kin, when the caths of himself and his principal were received as sufficient proof of relationship;[2] and the *alltud*, or foreigner, was not entitled to the raith unless he had kindred to serve on it.[3] How the custom sometimes worked in practice among the untameable barbarians is fairly illustrated by a case recounted by Aimoin as occurring under Chilperic I. in the latter half of the sixth century. A wife suspected by her husband offered the oath of purgation on the altar of St. Denis with her relatives, who were persuaded of her innocence; the husband not yet satisfied, accused the compurgators of perjury, and the fierce passions of both parties becoming excited, weapons were speedily drawn, and the sanctity of the venerable church was profaned with blood.[4]

It was manifestly impossible, however, to enforce the rule of kinship in all cases, for the number of compurgators varied in the different codes, and in all of them a great number were required when the matter at stake was large, or the crime or criminal important. Thus when Chilperic I. was assassinated in 584, doubts were entertained as to the legitimacy of his son Clotair, an infant of four months—doubts which neither the character of Queen Fredegonda nor the manner of Chilperic's death had any tendency to lessen—and Gontran, brother of the murdered king, did not hesitate to express his belief that the royal child's paternity was traceable to some one of the minions of the court, a belief doubtless stimulated by the promise it afforded him of another crown. Fredegonda, however, repaired her somewhat questionable reputation and

[1] Anomalous Laws, Bk. IX. chap. ii. § 4; chap. v. § 2 (Owen, II. 225, 233). This collection of laws is posterior to the year 1430.

[2] Anomalous Laws, Bk. V. chap. ii. § 117 (Ibid. II. p. 85).

[3] Ibid. § 144 (p. 95).

[4] Aimoini Lib. III. c. 29.

secured the throne to her offspring, by appearing at the altar with three bishops and three hundred nobles, who all swore with her as to the legitimacy of the little prince, and no further doubts were ventured on the delicate subject.[1] A similar case occurred in Germany in 899, when Queen Uta cleared herself of an accusation of infidelity, by taking a purgatorial oath with eighty-two nobles.[2] So in 824, a dispute between Hubert, Bishop of Worcester, and the Abbey of Berkeley, concerning the monastery of Westbury, was settled by the oath of the bishop, supported by those of fifty mass-priests, ten deacons, and a hundred and fifty other ecclesiastics.[3] These were, perhaps, exceptional instances, but in Wales the law required, as a regular matter, enormous numbers of compurgators in many cases. Privity to homicide, for instance, was divided into three triads, or nine classes of various degrees of guilt. Of these, the first triad called for one hundred raithmen to establish the denial; the second triad, 200, and the third, 300;[4] while, to rebut an accusation of killing with savage violence or poisoning, the enormous number of six hundred compurgators was considered necessary.[5] Even these armies of oath-takers did not widen the circle from which selection was allowed, for the law absolutely specifies that "the oaths of three hundred men of a kindred are required to deny murder, blood, and wound,"[6] and the possibility of finding them is only explicable by the system of tribes or clans in which all were legally related one to another. This is illustrated by a further regulation, according to which, under the

[1] Greg. Turon. Lib. VIII. c. 9. [2] Herman. Contract. ann. 899.

[3] Spelman. Concil. I. 335.

[4] Venedotian Code, Book III. chap. i. §§ 1–10.—Dimetian and Gwentian Codes, Book II. chap. i. §§ 10–12 (Owen I. 219–21, 407, 689).—There is very great confusion in these laws as to the numbers requisite for many crimes, but with respect to the accessories of *galanas*, or homicide, the rule appears to have been absolute.—Cf. Spelman, Glossary s. v. *Assath*.

[5] Venedotian Code, Book III. chap. i. § 18. Anomalous Laws, Book IV. chap. iii. §§ 12, 13 (Ibid. I. 231, II. 23).

[6] Ibid. § 17 (p. 231); cf. Book II. chap. viii. § 4 (p. 137).

Gwentian code, in an accusation of theft, with positive evidence, the thief was directed to clear himself with twenty-four raithmen of his own *cantrev* or district, in equal number from each *cymwd* or sub-district.[1]

Under a different social organization, it is evidently impossible that a kindred sufficiently large could have been assembled in the most numerous families, and even when the requirements were more reasonable, the same difficulty must frequently have occurred. This is recognized in the Danish laws of the thirteenth and fourteenth centuries, where the conjuratorial oaths of kindred, known as *neffn i kyn*, were requisite, unless the accused could swear that he had no relations, in which case he was allowed to produce twelve other men of proper character, *lag feste men*.[2] In a constitution of Frederic II. in 1235, the compurgators are required to be of the same class as their principal, and to be *sinodales homines*, men of undoubted character.[3] Thus the aid of those not connected by ties of blood must often have been necessary, and as it was a service not without danger, as we shall see hereafter, it is not easy to understand how the requisite number was reached. In certain cases, no doubt, the possibility of obtaining those not bound by kindred to undertake the office is traceable to the liability which in some instances rested upon a township for crime committed within its borders;[4] while the system of

[1] Gwentian Code, Book II. chap. iii. § 11 (Ibid. I. 691).

[2] Leg. Cimbric. Lib. II. c. 9.—Constit. Woldemari Regis §§ 9, 52, 56, 86. Throughout Germany a minor son could be cleared, even in capital accusations, by the single purgatorial oath of his father, if it was the first time that they had been defendants in court.—Jur. Provin. Alaman. cap. clxix. § 1; Sachsische Weichbild, art. 76.

[3] Böhlau, Nove constitutiones Dom. Alberti, pp. 2, 6, 12, 38 (Weimar, 1858). "Cum duobus viris bone opinionis et integri status, sinodalibus hominibus." The expression is doubtless derived from the *testes synodales* —men of standing and reputation selected in episcopal synods to act as a kind of grand jury and report the sins of their neighbors.

[4] This has been denied by those who assume that the *frithborgs* of Edward the Confessor are the earliest instance of such institutions, but traces

guilds in which the members shared with each other a responsibility resembling that of kinship rendered participation in the oath of denial almost a necessity when a comrade was prosecuted.[1]

It would be endless to specify all the variations in the numbers required by the different codes in all imaginable cases of quarrel between every class of society. Numerous elements entered into these regulations; the nature of the crime or claim, the station of the parties, the rank of the compurgators, and the mode by which they were selected. Thus, in the simplest and most ancient form, the Salic law merely specifies twenty-five compurgators to be equally chosen by both parties.[2] Some formulas of Marculfus specify three freeholders and twelve friends of the accused.[3] A Merovingian edict of 593 directs the employment of three peers of the defendant, with three others chosen for the purpose, probably by the court.[4]

of communal societies are to be found in the most ancient text of the Salic law (First text of Pardessus, Tit. XLV.), and both Childebert and Clotair II., in edicts promulgated near the close of the sixth century, hold the hundreds or townships responsible for robberies committed within their limits (Decret. Childeberti ann. 595, c. 10; Decret. Chlotarii II. c. 1).

It is not improbable that, as among all the barbarian races, the family was liable for the misdeeds of its members, so the tribe or clan of the offender was held responsible when the offence was committed upon a member of another tribe, and such edicts as those of Childebert and Clotair were merely adaptations of the rule to the existing condition of society. The most perfect early code that has reached us, that of the ancient Irish, expresses in detail the responsibility of each sept for the actions not only of its members, but of those also who were in any way connected with it. "And because the four nearest tribes bear the crime of each kinsman of their stock. . . . And because there are four who have an interest in every one who sues and is sued: the tribe of the father, the chief, the church, the tribe of the mother or foster-father. . . . Every tribe is liable after the absconding of a member of it, after notice, after warning, and after lawful waiting."—Senchus Mor, I. 263–5.

[1] See Mr. Pike's very interesting "History of Crime in England," Vol. I. pp. 61–2. London, 1873.

[2] First text of Pardessus, Tit. XLII. § 5.

[3] Marculf. App. xxxii.; xxix.

[4] Pact. pro Tenore Pacis cap. vi.

Alternative numbers, however, soon make their appearance, depending upon the manner in which the men were chosen. Thus among the Alamanni, on a trial for murder, the accused was obliged to secure the support of twenty designated men, or, if he brought such as he had selected himself, the number was increased to eighty.[1] So, in a capitulary of 803, Charlemagne prescribes seven chosen conjurators, or twelve if taken at random,[2] a rule which is virtually the same as that laid down by the Emperor Henry III. in the middle of the eleventh century.[3] In 922 the council of Coblentz directs that accusations of sacrilege could be rebutted with twenty-four chosen men, or seventy-two freemen not thus selected.[4] In Bigorre the law thus discriminated against the *cagots*—an infamous wandering race of uncertain origin—for cases in which the oaths of seven conjurators ordinarily sufficed required thirty *cagots*, when the latter were called upon to act.[5] In an English record of the fifteenth century we find a defendant called upon to prove his innocence with six of his neighbors or twelve strangers.[6]

Strangely enough, the church at one time adopted the principle that the higher the rank of the accused the more he must present of his peers as compurgators. Thus the bishop required eleven bishops, the priest five priests, and the deacon two deacons; but Cardinal Henry of Susa who enunciates this says it is an error, and that the number is at the discretion of the judge.[7] The rule, moreover, that the compurgators must be of the same rank and class as the accused was waived

[1] L. Alaman. Tit. lxxvi. [2] Capit. Car. Mag. IV. ann. 803, cap. x.

[3] Goldast. Constit. Imp. I. 231.

[4] Hartzheim Concil. German. II. 600.

[5] Lagrèze, Hist. du Droit dans les Pyrénées, p. 47, Paris, 1867.

[6] Pike, op. cit. I. 451.

[7] Pontificem parium manus expurgat duodena.
Sexta sacerdotem, levitam tertia purgat.
Maior maiori, minor est adhibenda minori.
Quem plebs infamat purgabitur in manifesto.
Hostiensis Aureæ Summæ Lib. v. Tit. *De Purgat. canon.* § 4.

when they were presumably inimical to him or the proper number could not be had, and thus a cleric might be cleared by the oaths of laymen.[1]

Variations likewise occur arising from the nature of the case and the character of the plaintiff. Thus in the Scottish law of the twelfth century, in a criminal charge, a man could defend himself against his lord with eleven men of good reputation, but if the king were the accuser, twenty-four were requisite, who were all to be his peers, while in a civil case twelve were sufficient.[2] So in the burgher laws of David I., ordinary cases between citizens were settled with ten conjurators, but eleven were necessary if the king were a party, or if the matter involved the life, limb, or lands of one of the contestants; and in cases occurring between a citizen and a countryman, each party had to provide conjurators of his own class.[3] In the complicated rules for compurgation which form the basis of the Welsh jurisprudence, there are innumerable details of this nature. We have seen that for some crimes many hundred *raith-men* were required, while similar numbers were enjoined in some civil suits respecting real property.[4] From this the number diminishes in proportion to the gravity of the case, as is well illustrated by the provisions for denying the infliction of a bruise. If the mark remained until the ninth day, the accused could deny it with "two persons of the same privilege as himself;" if it remained until the eighteenth day, the oaths of three conjurators were necessary; if till the twenty-seventh day, four *raith-men* were required.[5]

[1] Ibid. § 5.

[2] Quoniam Attachiamenta cap. xxiv. §§ 1, 4; cap. lxxv. §§ 1, 4. In another subsequent code, in simple cases of theft, when the accuser had no testimony to substantiate his claim, thirty conjurators were necessary, of whom three must be nobles (Regiam Majestatem Lib. IV. c. 21). For the disputed date of the *Regiam* see Neilson, Trial by Combat, ch. 30.

[3] Leg. Burgorum cap. xxiv. §§ 1, 3.

[4] Anomalous Laws, Book XIII. chap. ii. § 94 (Owen II. 521).

[5] Gwentian Code, Bk. II. chap. vii. § 10 (Ibid. I. 701).

The character of the *raith-men* also affected the number demanded. Thus, in a collection of Welsh laws of the fifteenth century there is an explanation of the apparent anomaly that privity to theft or homicide required for its defence a vastly greater number of compurgators than the commission of the crime itself. The large bodies prescribed for the former consisted simply of any men that could be had—of course within the recognized grades of kindred—while, for the latter, rules of varying complexity were laid down. Thus, of the twenty-four required for theft, in some texts it is prescribed that two-thirds are to be of the nearest paternal kin, and one-third of the nearest maternal; or, again, one-half *nod-men*.[1] So, in accusations of homicide, the same proportions of paternal and maternal kindred were required, all were to be proprietors in the country of the *raith*, and three, moreover, were to be men under vows of abstinence from linen, horses, and women, besides a proper proportion of *nod-men*.[2]

Instances also occur in which the character of the defendant regulated the number required. Among the Welsh, the laws of Hoel Dda provide that a wife accused of infidelity could disprove a first charge with seven women; if her conduct provoked a second investigation, she had to procure fourteen; while, on a third trial, fifty female conjurators were requisite for her escape.[3] Another application of the same

[1] Anomalous Laws, Bk. IX. chap. ii. § 4; chap. xx. § 12; chap. xxi. § 3.—Book XIV. chap. xxxviii. § 16.—Book V. chap. ii. § 112 (Ibid. II. 225, 261, 709, 83).

Under the primitive Venedotian Code (Book III. chap. i. §§ 13, 19) only twelve men were required, one-half to be *nod-men*, two-thirds of paternal, and one-third of maternal kin; while in the Gwentian Code (Book II. chap. ii. § 10) and in the Dimetian Code (Book II. chap. iii. § 10, Book III. chap. i. § 24), fifty are prescribed.

The *nod men*, as will be seen hereafter, were conjurators who took a special form of oath.

[2] Anomalous Laws, Book XIV. chap. xxxviii. § 16; Book IX. chap. xx. § 12; chap. xxi. § 1.

[3] Leges Wallice, Lib. II. cap. xxiii. § 17 (Owen II. 848). It is worthy of remark that one of the few instructions for legal procedures contained in

principle is found in the provision that when a man confessed a portion of the crime imputed to him and denied the remainder, an augmented *raith* was required to support his denial, because it is more difficult to believe a man who has admitted his participation in a criminal act. Thus when only fifty men were requisite to rebut a charge of homicide, and the accused admitted one of the accessories to homicide, his denial of the main charge had to be substantiated by one hundred, two hundred, or three hundred men, according to the nature of the case. On the other hand, where no criminal act was concerned, confession of a portion diminished the *raith* for the remainder. Thus in a claim for suretyship, six compurgators were necessary to the defendant; but if he admitted part of the suretyship, his unsupported oath was sufficient to rebut the remainder, as the admission of a portion rendered him worthy of belief.[1] In the Anglo-Saxon jurisprudence, the *frangens jusjurandum*, as it was called, also grew to be an exceedingly complex system in the rules by which the number and quality of the conjurators were regulated according to the nature of the crime and the rank of the accused. In cases of peculiar atrocity, such as violation of the sanctity of the grave, only thanes were esteemed competent to appear.[2] In fact, among the Anglo-Saxons, the value of a man's oath was rated according to his rank, that

the Korán relates to cases of this kind. Chapter xxiv. 6–9 directs that a husband accusing his wife of infidelity, and having no witnesses to prove it, shall substantiate his assertion by swearing five times to the truth of the charge, invoking upon himself the malediction of God; while the wife was able to rebut the accusation by the same process. As this chapter, however, was revealed to the Prophet after he had writhed for a month under a charge brought against his favorite wife Ayesha, which he could not disregard and did not wish to entertain, the law is rather to be looked upon as *ex post facto* than as indicating any peculiar tendency of the age or race.

[1] Anomalous Laws, Book XI. chap. v. §§ 40, 41 (Ibid. II. 445).

[2] Wealreaf, *i. e.*, mortuum refere, est opus nithingi; si quis hoc negare velit, faciat hoc cum xlviii. taynis plene nobilibus.—Leg. Æthelstani, de Ordalio.

of a thane, for instance, being equal to those of seven villeins.[1] The same peculiarity is observable among the Frisians, whose laws required that compurgators should be of the same class as their principal, and the lower his position in the State, the larger was the number requisite.[2]

It was, however, not only the number of compurgators required that affected the result, but the method by which they were chosen, and this gave rise to wide variations in practice. Originally, it is probable that the selection was left to the accused, who gathered them from among his kindred. This would lead almost inevitably to his acquittal, as forcibly pointed out by Hincmar in the ninth century. In objecting to admit the purgation of an offending priest with ecclesiastics of his own choice, he states that evil-minded men combined together to defeat justice and secure immunity for their crimes by serving each other in turn, so that when the accused insisted on offering his companions to the oath, it was necessary to make them undergo the ordeal to prove their sincerity.[3] His expressions indicate that the question of selection at that time was undecided in France, and the alternative numbers alluded to above show one of the methods adopted to meet the evident evils of the process. Other nations devised various expedients. The original Lombard law of King Rotharis gave to the

[1] Sacramentum liberalis hominis, quem quidem vocant *twelfhendeman*, debet stare et valere juramentum septem villanorum (Cnuti Secular. cap. 127). The *twelfhendeman* meant a thane (Twelfhindus est homo plene nobilis i. Thainus.—Leg. Henrici I. Tit. lxxvi. § 4), whose price was 1200 solidi. So thoroughly did the structure of jurisprudence depend upon the system of *wer-gild* or composition, that the various classes of society were named according to the value of their heads. Thus the villein or *cherleman* was also called *twyhindus* or *twyhindeman*, his *wer-gild* being 200 solidi; the *radcnicht* (road-knight, or mounted follower) was a *sexhendeman;* and the comparative judicial weight of their oaths followed a similar scale of valuation, which was in force even subsequently to the Conquest (Leg. Henrici I. Tit. lxiv. § 2).

[2] L. Frision. Tit. I.

[3] Hincmari Epist. xxxiv. So also in his Capit. Synod. ann. 852, II. xxv.

plaintiff the privilege of naming a majority of the compurgators, the remainder being chosen by the defendant,[1] but even in this the solidarity of the family was recognized, since it was the duty of the plaintiff to select the nearest relatives of his adversary, provided they were not personally hostile to the accused.[2] This same spirit is shown even so late as 1116, in a charter by which Baldwin VII. of Flanders gratified the citizens of Ypres by substituting among them the process of compurgation for the ordeal and battle trial. According to this, the accuser selected four of the relatives of the accused to take the purgatorial oath; if they refused through known enmity, he was bound to select four other of the kindred, and if none such were to be found then four legal men sufficed.[3] The English law was the first to educe a rational mode of trial from the absurdity of the barbaric traditions, and there the process finally assumed a form which occasionally bears a striking resemblance to trial by jury—in fact, it insensibly runs into the latter, to the rise of which it probably contributed. By the laws of Canute, in some cases, fourteen men were named to the defendant, among whom he was obliged to find eleven willing to take the purgatorial oath with him.[4] The selection of these virtual jurors was probably made by the *gerefa*, or sheriff;[5] they could be

[1] L. Longobard. Lib. II. Tit. lv. § 5. [2] Ibid. Tit. xxi. § 9.

[3] Proost, Récherches sur la Législation des Jugements de Dieu, Bruxelles, 1868, p. 96.

[4] Nominentur ei XIV., et adquirat XI., et ipse sit duodecimus.—L. Cnuti c. lxvi. Horne, who probably lived in the reign of Edward II., attributes to Glanville the introduction of the jury-trial.—"Car, pur les grandes malices que lon soloit procurer en testmonage et les grands delaies qui se fierent en les examinements, exceptions et attestations, ordeina Randulph de Glanvile celle certeine Assise ou recognitions et jurées se feissent per XII jurors, les procheins vicines, et issint est cest establissement appelé assise."—Myrror of Justice, cap. II. sect. xxv. For a minute examination into the origin of the jury-trial, see a series of articles by Prof. J. B. Thayer in the Harvard Law-Review for 1892.

[5] Laws of Ethelred, Tit. III. c. xiii.

challenged for suspicion of partiality or other competent cause, and were liable to rejection unless unexceptionable in every particular.[1] Very similar to this was the *stockneffn* of the ancient Danish law, by which, in cases where the relatives were not called upon, thirteen men were chosen, a majority of whom could clear the accused by taking the oath with him. They were nominated by a person appointed for the purpose, and if the court neglected this duty, the privilege enured to the plaintiff.[2] More facile for the defence was a process prescribed in a Spanish charter of 1135, where, in cases of homicide, it sufficed for the accused to obtain five conjurators out of twelve selected by the magistrates.[3] A method combining selection and chance is described in the custumal of Ipswich in the twelfth century, to decide questions of debt between the townsfolk. The party on whom proof was incumbent brought in ten men; these were divided into two bands of five each, and a knife was thrown up between them; the band towards which the point of the knife fell was taken, one of the five was set aside, and the remaining four served as conjurators.[4]

The Northern nations were evidently less disposed to favor the accused than the Southern. In Sweden and Denmark, another regulation provides that although the defendant had a right to demand this mode of purgation, yet the plaintiff had the selection of the twelve men who served as conjurators; three of these the accused could challenge for enmity, but their places were supplied by the plaintiff.[5] The evanescent code compiled for Iceland by Haco Haconsen and his son Magnus, towards the close of the thirteenth century, is

[1] L. Henrici I. Tit. xxxi. § 8; Tit. lxvi. § 10.

[2] Constit. Woldemari Regis §§ lii. lxxii.

[3] Fuero de Balbás (Coleccion de Privilegios, etc. Madrid, 1833, T. VI. p. 85).

[4] Prof. J. B. Thayer, in Harvard Law Review, Vol. V. p. 58.

[5] L. Scaniæ Lib. vii. c. 8.—Chart. Woldemari Regis, ann. 1163 (Du Cange s. v. *Juramentum*).

more equitable in its provisions. Though it leaves the nomination of the conjurators to the defendant, the choice is subject to limitations which placed it virtually in the power of the court. They were required to be men of the vicinage, of good repute, peers of the accused, and in no way connected with him by blood or other ties.[1] The more lasting code promulgated at the same time by Magnus for his Norwegian dominions, a code which became the common law of Norway for 500 years, provides, for cases in which eleven conjurators are required, that seven of them shall be selected of intelligent men of full age, and in no way related to the accused, yet residents of the vicinage, and acquainted with the facts; the accused can then add four more of good character, himself making the twelfth.[2] We see here, as in the English jurisprudence, how nearly the conjuratorial process approaches to the jury-trial, and how completely it has departed from its origin in the solidarity of the family.

Such care in the selection of those on whom duties so responsible devolved did not prevail among the more Southern races at an earlier age. Among the Lombards slaves and women in tutelage were often employed.[3] The Burgundians required that the wife and children, or, in their absence, the father and mother of the accused should assist in making up the number of twelve,[4] the object being evidently to increase the responsibility of the family for the action of its head. The abuses of this custom, however, caused its prohibition under Charlemagne for the reason that it led to the swearing of children of tender and irresponsible age.[5] That legislator, however, contented himself with forbidding those who had once been convicted of perjury from again appearing either as witnesses or conjurators;[6] and the little care that was deemed

[1] Jarnsida, Thiofa-Balkr, cap. ix. x.

[2] Leges Gulathingenses, Thiofa-Bolkr, c. xiii. (Ed. Havniæ 1817, p. 547).

[3] L. Longobard. I. xxxiii. 1, 3.

[4] L. Burgund. Tit. viii.

[5] Capit. Car. Mag. I. ann. 789 c. lxii.

[6] Ibid.

necessary in their selection under the Carlovingian jurisprudence is shown by a law of Louis le Débonnaire ordering that landless freemen should be allowed to serve as conjurators, though ineligible as witnesses.[1] A truer conception of the course of justice is manifested, some centuries later, by the Béarnese legislation, which required that the *seguidors* or conjurators, as well as the *testimonis* or witnesses should be men able to pay the amount at stake, together with the fine incurred by the losing party,[2] or that they should be fair and loyal men, not swayed by enmity.[3]

In ecclesiastical trials it would seem that the selection of compurgators rested with the bishop. In a case occurring in the thirteenth century, of a priest accused of homicide who failed in his compurgation, he appealed to the Holy See on the ground that his accusers were perjurers and that the bishop had chosen the compurgators to suit himself.[4] As a matter of course, the result of the trial depended, as it does with the modern jury, on the fairness with which the choice was made, and in the universal corruption of the middle ages there is no reason to suppose that favoritism or bribery was not a controlling influence in a majority of cases.

CHAPTER V.

CONDITIONS OF COMPURGATION.

THE conditions under which resort was had to this mode of deciding litigation have been the subject of some discussion. It has been assumed that, in the early period, before the ferocious purity of the Barbarians had become adulterated

[1] Capit. Ludov. Pii ann. 829 Tit. III. § vi.

[2] For. de Morlaas, Rubr. xli. art. 146–7.

[3] Que sien boos et loyaus, et que no sien enemicxs.—Fors de Béarn, Rubr. xxx.

[4] Formulary of the Papal Penitentiary, Philadelphia, 1892, p. 100.

under the influence of Roman civilization, it was used in all description of cases, at the option of the defendant, and was in itself a full and satisfactory proof, received on all hands as equal to any other.[1] The only indication that I have met with, among the races of Teutonic stock, tending to the support of such a conjecture, occurs in the Lombard code, where Rotharis, the earliest compiler of written laws, abolishes a previously existing privilege of denying under oath a crime after it had been confessed.[2] A much more powerful argument on the other side, however, is derivable from the earliest text of the Salic law, to which reference has already been made. In this, the formula shows clearly that conjurators were only employed in default of other testimony;[3] and what lends additional force to the conclusion is that this direction disappears in subsequent revisions of the law, wherein the influences of Christianity and of Roman civilization are fully apparent. No safe deductions, indeed, can be drawn from mere omissions to specify that the absence of witnesses was necessary, for these ancient codes are drawn up in the rudest manner, and regulations which might safely be presumed to be familiar to every one would not, in their curt and barbarous sentences, be repeated with the careful redundancy which marks our modern statutes. Thus there is a passage in the code of the Alamanni which declares in the most absolute form that if a man commits a murder and desires to deny it,

[1] Königswarter, Études Historiques. p. 167.

Nam nulli liceat, postquam manifestaverit, postea per sacramentum negare, quod non sit culpabilis, postquam ille se culpabilem assignavit. Quia multos cognovimus in regno nostro tales pravas opponentes intentiones, et hæc moverunt nos præsentem corrigere legem, et ad meliorem statum revocare.—L. Longobard. Lib. II. Tit. lv. § 8.

[3] Si quis hominem ingenuo plagiaverit et probatio certa non fuit, sicut pro occiso juratore donet. Si juratores non potuerit invenire, VIII M dinarios, qui faciunt solidos CC, culpabilis judicetur (Tit. xxxix. § 2). A similar provision—"si tamen probatio certa non fuerit"—occurs in Tit. xlii. § 5.

he can clear himself with twelve conjurators.[1] This, by itself, would authorize the assumption that compurgation was allowed to override the clearest and most convincing testimony, yet it is merely a careless form of expression, for another section of the same code expressly provides that where a fact is proved by competent witnesses the defendant shall not have the privilege of producing compurgators.[2]

It therefore seems evident that, even in the earliest times, this mode of proof was only an expedient resorted to in doubtful matters, and on the necessity of its use the *rachinborgs* or judges probably decided. A case recorded in the Landnamabok certainly shows that among the heathen Norsemen the Godi or priest-judge had this power, for when Thorbiorn Digre prosecuted Thorarin of Mafahlid for horse-stealing, and demanded that he should produce twelve conjurators, Arnkell, the Godi, decided that the accused might clear himself with his simple oath on the holy ring of the altar, and thus the prosecution came to naught except as leading to a bloody feud.[3] That this discretion was lodged in the court in subsequent times is generally admitted. It is scarcely worth while to multiply proof; but a few references will show the light in which the custom was regarded.[4]

[1] Si quis hominem occiderit et negare voluerit, cum duodecim nominatis juret.—L. Alaman. Tit. LXXXIX.

[2] L. Alaman. Tit. XLII. [3] Islands Landnamabok II. ix. (p. 83).

[4] For instance, in the Baioarian law—"Nec facile ad sacramenta veniatur. . . . In his vero causis sacramenta præstentur in quibus nullam probationem discussio judicantis invenerit" (L. Baioar. Tit. VIII. c. 16). In a Capitulary of Louis le Débonnaire—"Si hujus facti testes non habuerit cum duodecim conjuratoribus legitimis per sacramentum adfirmet" (Capit. Ludov. Pii ann. 819, § 1). In one of the Emperor Lothair—"Si testes habere non poterit, concedimus ut cum XII. juratoribus juret" (L. Longobard. Lib. I. Tit. IX. § 37). So Louis II., in 854, ordered that a man accused of harboring robbers, if taken in the act, was to be immediately punished; but if merely cited on popular rumor, he was at liberty to clear himself with twelve compurgators (Recess. Ticinen. Tit. II. cap. 3).

It was the same in subsequent periods. The Scottish law of the thirteenth

As employed by the Church, the rule was distinctly enunciated in the thirteenth century that the accused was not to be allowed to clear himself by canonical purgation when the crime was notorious or when the accuser offered to prove the charge.[1]

The Welsh, however, were exceptional in this respect. The

century alludes to the absence of testimony as a necessary preliminary, but when an acquittal was once obtained in this manner the accused seems to have been free from all subsequent proceedings, when inconvenient witnesses might perhaps turn up—"Et si hoc modo purgatus fuerit, absolvetur a petitione Regis in posterum" (Regiam Majestatem, Lib. IV. c. 21). So, in the laws of Nieuport, granted by Philip of Alsace, Count of Flanders, in 1163 "Et si hoc scabini vel opidani non cognoverint, conquerens cum juramento querelam suam sequetur, et alter se excusabit juramento quinque hominum" (Leg. secundæ Noviportus). See also the Consuetud. Tornacens. ann. 1187, §§ ii. iii. xvi., where two conjurators release a defendant from a claim of debt unsupported by evidence. In case of assault, "si constans non fuerit," two conjurators clear the accused; in case of wounding, six are required if the affair occurred by daylight; if at night, the cold water ordeal is prescribed (D'Achery, Spicileg. III. 551–2). The legislation of Norway and Iceland in the next century is even more positive "Iis tantum concessis quæ legum codices sanciunt, juramenta nempe purgatoria et accusatoria, ubi legitimi defuerint testes" (Jarnsida, Mannhelge, cap. xxxvii.).

On the other hand, an exception to this general principle is apparently found in a constitution of the Emperor Henry III., issued about the middle of the eleventh century "Si quem ex his dominus suus accusaverit de quacunque re, licet illi juramento se cum suis coæqualibus absolvere, exceptis tribus: hoc est si in vitam domini sui, aut in cameram ejus consilium habuisse arguitur, aut in munitiones ejus. Cæteris vero hominibus de quacunque objectione, absque advocato, cum suis coæqualibus juramento se poterit absolvere" (Goldast. Constit. Imp. I. 231).

In a constitution of Frederic II. in 1235, the oaths of six compurgators clear a man accused of having commenced hostilities without awaiting the three days term prescribed after defiance, no evidence being alluded to on either side—"et nisi violator productus super hoc vel septena manu sinodalium hominum purgaverit innocentiam suam quod non commiserat contra hoc statutum perpetuo pene subiaceat quod dicitur erenlos und rehtlos"—Nove Constitutiones Dom. Alberti, p. 12 (Weimar, 1858).

[1] S. Raymondi Summæ Lib. III. Tit. xxxi. § v. *ad calcem.*

raith was the corner-stone of their system of jurisprudence. It was applied to almost all actions, whether of civil or criminal law, and even cases of doubtful paternity were settled by it, no woman, except one "of bush and brake" who had no legal kindred, being allowed to give testimony or take an oath with respect to the paternity of her illegitimate child.[1] It excluded and superseded all other procedures. If the accused declined to take the oath of denial, then testimony on both sides could be introduced, and the case be settled on the evidence adduced;[2] but where he chose to abide by the *raith*, the Book of Cynog formally declares that "Evidences are not to be brought as to *galanas* [homicide], nor *saraad* [insults], nor blood, nor wound, nor ferocious acts, nor waylaying, nor burning buildings, nor theft, nor surety, nor open assault, nor adultery, nor violence, nor in a case where guardians should be, nor in a case where an established raith is appointed by law; because evidences are not to extinguish a raith."[3] Indeed, the only case which I have found wherein it was refused is where a priest of the same parish as one accused of theft testifies to have seen him in open daylight with the article stolen in his possession, when apparently the sacred character of the witness precludes a denial on the part of the defendant.[4]

Among other races confidence in its ability to supplement absent or deficient testimony was manifested in another form—the *juramentum supermortuum*—which was employed by various nations, at wide intervals of time. Thus, in the earliest legislation of the Anglo-Saxons, we find that when the defendant or an important witness was dead, the oath which he would have taken or the deposition which he would have made

[1] Gwentian Code, Book II. chap. xxxix. § 40 (Owen I. 787). So, in disowning a child, if the reputed father were dead, the oaths of the chief of the kindred, with seven of the kinsmen, were decisive, or, in default of the chief, the oaths of fifty kinsmen (Ibid. § 41).

[2] Anomalous Laws, Book IX. chap. ii. § 9 (Ibid. II. 227).

[3] Ibid. Book VIII. chap. xi. § 31 (Ibid. II. 209).

[4] Ibid. Book IX. chap. ii. § 6 (Ibid. II. 227).

was obtained by proceeding to his tomb, where a certain number of conjurators swore as to what he could or would have done if alive.[1] Two centuries later, the same custom is alluded to in the Welsh laws of Hoel Dda,[2] and even as late as the thirteenth century it was still in force throughout Germany.[3] There were other cases in which evidence of any kind was almost impossible, and in these the wager of law offered a convenient resource. Thus, Frederic II., in 1235, decreed that a man harboring an outlaw should himself be outlawed, but he was allowed to prove with six conjurators that he was ignorant of the outlawry.[4]

A remarkable use of conjurators to confirm the evidence of witnesses occurs in 850 in a dispute between Cantius, Bishop of Siena, and Peter, Bishop of Arezzo, concerning certain parishes claimed by both. The occasion was a solemn one, for it was before a council held in Rome presided over jointly by Pope Leo IV. and the Emperor Louis II. Peter relied upon written charters, while Cantius produced witnesses. The Emperor pronounced the claim of the latter to be just, when he and twelve priests swore that the oaths of the witnesses were true and without deceit, whereupon the disputed parishes were adjudged to him.[5]

The employment of compurgators, however, depended frequently upon the degree of crime alleged, or the amount at stake. Thus, in many codes, trivial offences or small claims were disposed of by the single oath of the defendant, while more important cases required compurgators, whose numbers increased with the magnitude of the matter in question. This

[1] Dooms of Ine, cap. liii.

[2] Leg. Wallice, Lib. II. cap. xix. § 2 (Owen II. 842).

[3] Ea autem debita de quibus non constat, super mortuum probari debent, septima manu.—Jur. Provin. Alaman. cap. vii. § 2. (Ed. Schilter.)—Sachsische Weichbild art. 67.

[4] Nove Constitutiones Dom. Alberti, p. 38.

[5] "Quod in sacramentis supradictorum testium veritas absque ullo dolo versata est."—Leon. PP. IV. Epist. 5 (Migne, CXV. 664).

principle is fairly illustrated in a charter granted to the Venetians in the year 1111 by Henry V. In suits which involved only the value of a silver pound, the oath of the party was sufficient; but if the claim amounted to twelve pounds or more, then twelve chosen men were requisite to substantiate the oath of negation.[1]

In England in the thirteenth century we find compurgation very generally employed in the manorial courts for the settlement of petty criminal actions. So general was its use, indeed, that it obtained the name of "law," as the legal method *par excellence*, and the process is curtly described in the reports as "facere legem," "esse ad legem," "vadiare legem," whence is derived the term "wager of law." The number of compurgators was generally two or five, and they seem to have been left, as a rule, to the choice of the defendant, so that failure to procure the requisite number was very unusual.[2]

In later times, compurgation was also sometimes used as an alternative when circumstances prevented the employment of other popular modes of deciding doubtful cases. Those, for instance, who would ordinarily be required to defend themselves by the wager of battle, were permitted by some codes to substitute the oaths of a certain number of conjurators, when precluded by advanced age from appearing in the arena. The burgher law of Scotland affords an example of this,[3] though elsewhere such cases were usually settled by the substitution of champions. Class privileges also manifested themselves in this as in so many other features of mediæval law, and we sometimes find compurgation allowed as a favor to those of gentle birth. Thus, in the Council of Reims in 1119, among

[1] Lünig Cod. Ital. Diplom. II. 1955.

[2] Maitland, Select Pleas in Manorial and other Seignorial Courts, pp. 7, 10, 18, 32, 36, 37, 47, 83, 137, 140, 141, 142, 144, 151, 157, 173.

[3] Si burgensis calumniatus præteriit ætatem pugnandi, et hoc essoniaverit in sua responsione, non pugnabit. Sed juramento duodecim talium qualis ipse fuerit, se purgabit.—L. Burgorum cap. 24, §§ 1, 2.

the provisions for the enforcement of the Truce of God, accusations of its violation are rebutted by knights with six compurgators, while common people are required to undergo the ordeal.[1]

CHAPTER VI.

FORMULAS AND PROCEDURE.

The primitive law-givers were too chary of words in their skeleton codes to embody in them the formula usually employed for the compurgatorial oath. We have therefore no positive evidence of its nature in the earliest times; but as the forms made use of by several races at a somewhat later period have been preserved, and as they resemble each other in all essential respects, we may reasonably assume that little variation had previously occurred. The most ancient that I have met with occurs in an Anglo-Saxon formulary which is supposed to date from about A. D. 900: "By the Lord, the oath is clean and unperjured which N. has sworn."[2] A century later, in a compilation of the Lombard law, it appears: "That which the accused has sworn is true, so help me God."[3] The form specified in Béarn, at a period somewhat subsequent, is curt and decisive: "By these saints, he tells the truth;"[4] while the code in force in Normandy until the sixteenth century directs an oath identical in spirit: "The oath which William has sworn is true, so help me God and his saints."[5]

[1] Concil. Remens. ann. 1119 (Harduin. VI. 1986).

[2] On þone Drihten se að is clæne and unmæne þe N. swor.—Thorpe's Ancient Laws, I. 180–1.

[3] Hoc quod appellatus juravit, verum juravit. Sic Deus, etc.—Formul. Vet. in L. Longobard (Georgisch, 1275).

[4] Per aquetz santz ver dits.—Fors de Béarn, Rubr. LI. art. 165.

[5] Du serment que Guillaume a juré, sauf serment a juré, ainsi m'aist Dieu et ses Sainctz.—Ancienne Cout. de Normandie, chap. lxxxv. (Bourdot de Richebourg, IV. 54).

It will be observed that all these, while essentially distinct from the oath of a witness, are still unqualified assertions of the truth of the principal, and not mere asseverations of belief or protestations of confidence. The earliest departure from this positive affirmation, in secular jurisprudence, occurs in the unsuccessful attempt at legislation for Norway and Iceland by Haco Haconsen in the thirteenth century. In this, the impropriety of such oaths is pointed out, and it is directed that in future the compurgator shall swear only, in confirmation of his principal, that he knows nothing to the contrary.[1] In the similar code promulgated in 1274 by his son Magnus in Norway, it is directed that the accused shall take a full oath of denial, and the conjurators shall swear in the same words that his oath is true, and that they know nothing truer.[2]

We shall see that, before the custom fell into total disuse, the change which Haco vainly attempted, came to be generally adopted, in consequence, principally, of the example set by the church. Even before this was formally promulgated by the Popes, however, ecclesiastics occasionally showed that they were more careful as to what they swore, and at a comparatively early period they introduced the form of merely asserting their belief in the oath taken by their principal. Thus, in 1101, we find two bishops endeavoring to relieve a brother prelate from a charge of simony, and their compurgatorial oath ventures no further than "So help me God, I believe that Norgaud, Bishop of Autun, has sworn the truth."[3]

[1] Nobis adhæc Deo coram periculosum esse videtur, ejus, cujus interest, jusjurandum purgatorium edendo præeunte, omnes (ab eo productos testes) iisdem ac ille conceptis verbis jurare, incerti quamvis fuerint, vera ne an falsa jurent. Nos legibus illatum volumus ut ille, cujus interest, jusjurandum conceptis verbis solum præstet, cæteri vero ejus firment juramentum adjicientes se nequid verius, Deo coram, scire, quam jurassent.—Jarnsida, Mannhelge, cap. xxxvii.—The passage is curious, as showing how little confidence was really felt in the purgation, notwithstanding the weight attached to it by law.

[2] Leges Gulathingenses, Thiofa-Bolkr, c. xiii.

[3] Credo Norigaudum istum Eduensem episcopum vera jurasse, sicut me Deus adjuvet.—Hugo. Flaviniac. Lib. II.

In the form of oath, however, as well as in so many other particulars, the Welsh had a more complicated system, peculiar to themselves. The ordinary *raith-man* only was required to take an oath "that it appears most likely to him that what he swears to is true." In many aggravated crimes, however, a certain proportion, generally one-half, had to be *nod-men* who were bound to a more stringent form, as the law specifies that "the oath of a nod-man is, to be in accordance with what is sworn by the criminal."[1] The difference, as we have seen, in the numbers required when a portion were *nod-men* shows how much more difficult it was to find men willing to swear to an absolute denial, and how much more weight was attached to such a declaration than to the lax expression of opinion contained in the ordinary oath of the *raith-man*.

Variations are likewise observable in the form of administering the oath. Among the Alamanni, for instance, the compurgators laid their hands upon the altar, and the principal placed his hand over the others, repeating the oath alone;[2] while among the Lombards, a law of the Emperor Lothair directs that each shall take the oath separately.[3] It was always, however, administered in a consecrated place, before delegates appointed by the judges trying the cause, sometimes on the altar and sometimes on relics. In the Welsh laws of the fifteenth century it is specified that all *raiths* shall be administered in the parish church of the defendant, before the priest shall have disrobed or distributed the sacramental bread.[4] At an earlier period a formula of Marculfus specifies the Capella S. Martini, or cope of St. Martin,[5] one of the most venerated relics of the royal chapel, whence we may perhaps conclude that it was habitually used for that purpose in the business of the royal Court of Appeals.

[1] Anomalous Laws, Book VII. chap. i. § 18 (Owen, II. 135).

[2] L. Alaman. Tit. vi. [3] L. Longobard. Lib. II. Tit. lv. § 28.

[4] Anomalous Laws, Book IX. chap. vi. § 4; chap. xvii. § 5.—cf. Book VI. chap. i. § 50 (Owen. II. 235, 255, 113).

[5] Marculf. Lib. I. Formul. xxxviii.

Notwithstanding the universality of the custom, and the absolute character of the decisions reached by the process, it is easy to discern that the confidence reposed in it was of a very qualified character, even at an early period. The primitive law of the Frisians describes some whimsical proceedings, prescribed for the purpose of determining the responsibility for a homicide committed in a crowd. The accuser was at liberty to select seven from among the participants of the brawl, and each of these was obliged to deny the crime with twelve conjurators. This did not absolve them, however, for each of them was also individually subjected to the ordeal, which finally decided as to his guilt or innocence. In this, the value of the compurgation was reduced to that of the merest technical ceremony, and yet a failure to procure the requisite number of supporters was tantamount to a conviction, while, to crown the absurdity of the whole, if any one succumbed in the ordeal, his conjurators were punished as perjurers.[1] A similar want of confidence in the principle involved is shown by a reference in the Anglo-Saxon laws to the conjurators of an accused party being outsworn (*overcythed*), when recourse was likewise had to the ordeal.[2] Among the heathen Norsemen, indeed, an offer by either party to produce conjurators could always be met by the antagonist with a challenge to the duel, which at once superseded all other proceedings.[3] As regards the church, although the authoritative use of compurgation among ecclesiastics would seem to demand for it among them implicit faith in its results, yet we have already seen that, in the ninth century, Hincmar did not hesitate to require that in certain cases it should be confirmed by the ordeal; and two centuries later, a remark of Ivo of Chartres implies a strong degree of doubt as to its efficacy. In relating that Sanctio, Bishop-elect of Orleans, when accused of simony by a disappointed rival, took the oath of

[1] L. Frisionum Tit. xiv.

[2] Dooms of King Edward, cap. iii.

[3] Keyser's Religion of the Northmen, Pennock's Transl. p. 246.

negation with seven compurgators, he adds that the accused thus cleared himself as far as he could in the eyes of man.[1] That the advantages it offered to the accused were duly appreciated, both by criminals and judges, is evident from the case of Manasses, Archbishop of Reims. Charged with simony and other offences, after numerous tergiversations he was finally summoned for trial before the Council of Lyons, in 1080. As a last effort to escape the impending doom, he secretly offered to Bishop Hugh, the Papal legate, the enormous sum of two hundred ounces of gold and other presents in hand, besides equally liberal prospective payments, if he could obtain the privilege of compurgation with six suffragan bishops. Gregory VII. was then waging too uncompromising a war with the corroding abuse of simony for his lieutenant to yield to any bribe, however dazzling; the proffer was spurned, Manasses confessed his guilt by absence, and was accordingly deposed.[2] Incidents like this, however, did not destroy confidence in the system, for, some sixty years later, we find Innocent II. ordering the Bishop of Trent, when similarly accused of simony, to clear himself with the oaths of two bishops and three abbots or monks.[3]

The comparative value attached to the oaths of conjurators is illustrated by the provisions which are occasionally met with, regulating the cases in which they were employed in default of witnesses, or in opposition to them. Thus, in the Baioarian law, the oath of one competent witness is considered to outweigh those of six conjurators;[4] and among the Lombards, an accusation of murder which could be met with three witnesses required twelve conjurators as a substitute.[5]

It is therefore evident that conjurators were in no sense witnesses, that they were not expected to give testimony, and that they merely expressed their confidence in the veracity of

[1] Quantum in conspectu hominum purgari poterat.—Ivon. Epist. liv.

[2] Hugo Flaviniac. Lib. II.

[3] Gratian. c. 17, Caus. II. Q. v.

[4] L. Baioar. Tit. XIV. cap. i. § 2.

[5] L. Longobard. Lib. I. Tit. ix. § 37.

their principal. It may consequently at first sight appear somewhat unreasonable that they should be held guilty of perjury and subject to its penalties in case of unluckily sustaining the wrong side of a cause. It is probably owing to this apparent injustice that some writers have denied that they were involved in the guilt of their principal, and among others the learned Meyer has fallen into this error.[1] The proof, however, is too clear for dispute. We have already seen that the oath was an unqualified assertion of the justice of the side espoused, without reservation justifying the escape of the compurgators from the charge of false swearing, and one or two incidental references have been made to the punishments inflicted on them when subsequently convicted of perjury. The code of the Alamanni recognized the guilt involved in such cases when it denied the privilege of compurgation to any one who had previously been more than once convicted of crime, giving as a reason the desire to save innocent persons from incurring the sin of perjury.[2] Similar evidence is derived from a regulation promulgated by King Liutprand in the Lombard Law, by which a man nominated as a conjurator, and declining to serve, was obliged to swear that he dared not take the oath for fear of his soul.[3] A case in point occurs in the life of St. Boniface, whose fellow-laborer Adalger in dying left his property to the church. The graceless brothers of the deceased disputed the bequest, and offered to make good their claim to the estate by the requisite number of oaths. The holy man ordered them to swear alone, in order not to be concerned in the destruction of their conjurators, and on their unsupported oaths gave up the property.[4]

[1] Institutions Judiciaires, I. 308.

[2] Ut propter suam nequitiam alii qui volunt Dei esse non se perjurent, nec propter culpam alienam semetipsos perdant.—L. Alaman. Tit. xlii. § 1.

[3] Quod pro anima sua timendo, non præsumat sacramentalis esse.—L. Longobard. Lib. II. Tit. lv. § 14.

[4] Othlon. Vit. S. Bonif. Lib. II. c. xxi.—"Vos soli juratis, si vultis; nolo ut omnes hos congregatos perdatis."—Boniface, however, did not weakly

The law had no hesitation in visiting such cases with the penalties reserved for perjury. By the Salic code unlucky compurgators were heavily fined.[1] Among the Frisians, they had to buy themselves off from punishment by the amount of their *wer-gild*—the value set upon their heads.[2] A slight relaxation of this severity is manifested in the Carlovingian legislation, by which they were punished with the loss of a hand—the customary penalty of perjury—unless they could establish, by undergoing the ordeal, that they had taken the oath in ignorance of the facts; but even in trifling causes a defeated litigant could accuse his own conjurator of perjury, when both parties were sent to the ordeal of the cross, and if the conjurator broke down he lost a hand.[3] So late as the close of the twelfth century, we find Celestin III. ordering the employment of conjurators in a class of cases about the facts of which they could not possibly know anything, and decreeing that if the event proved them to be in error they were to be punished for perjury.[4] That such liability was fully recognized at this period is shown by the argument of Aliprandus of Milan, a celebrated contemporary legist, who, in maintaining the position that an ordinary witness committing perjury must always lose his hand, without the privilege of redeeming it, adds that no witness can perjure himself unintentionally; but that conjurators may do so either knowingly or unknowingly, that they are therefore entitled to the benefit of the doubt, and if not wittingly guilty, that they should have the privilege of redeeming their hands.[5]

abandon the cause of the church. He freely invoked curses on the greedy brethren, which being fulfilled on the elder, the terror-stricken survivor gladly relinquished the dangerous inheritance.

[1] L. Salic. Tit. I. §§ 3, 4. [2] L. Frisionum Tit. X.

[3] Capit. Pippini ann. 793 § 15.—Capit. Car. Mag. incert. anni c. x. (Martene Ampl. Collect. VII. 7).

[4] Celest. PP. III. ad Brugnam Episc. (Baluz. et Mansi, III. 382).

[5] Cod. Vatican. No. 3845, Gloss. ad L. 2 Lombard. II. 51, apud Savigny, Geschichte d. Rom. Recht. B. iv.—I owe this reference to the kindness of my friend J. G. Rosengarten, Esq.

All this seems in the highest degree irrational, yet in criticising the hardships to which innocent conjurators were thus exposed, it should be borne in mind that the whole system had become a solecism. In its origin, it was simply summoning the kinsmen together to bear the brunt of the court, as they were bound to bear that of battle; and as they were liable for a portion of the fine which was the penalty of all crimes —personal punishments for freemen being unknown—they could well afford to incur the risk of paying for perjury in order to avoid the assessment to be levied upon them in case of the conviction of their relative. In subsequent periods, when the family responsibility became weakened or disused, and the progress of civilization rendered the interests of society more complex, the custom could only be retained by making the office one not to be lightly undertaken. A man who was endeavoring to defend himself from a probable charge of murder, or who desired to confirm his possession of an estate against a competitor with a fair show of title, was expected to produce guarantees that would carry conviction to the minds of impartial men. As long as the practice existed, it was therefore necessary to invest it with every solemnity, and to guard it with penalties that would obviate some of its disadvantages.

Accordingly, we find that it was not always a matter of course for a man to clear himself in this manner. The ancient codes have frequent provisions for the fine incurred by those unable to procure the requisite number of compurgators, showing that it was an occurrence constantly kept in mind by legislators. Nor was it only landless and friendless men who were exposed to such failures. In 794, a certain Bishop Peter was condemned by the Synod of Frankfort to clear himself, with two or three conjurators, of the suspicion of being involved in a conspiracy against Charlemagne, and, small as was the number, he was unable to procure them.[1]

[1] Capit. Car. Mag. ann. 794 § 7.

So, in the year 1100, when the canons of Autun, at the Council of Poitiers, accused their bishop, Norgaud, of simony and other irregular practices, and he proposed to absolve himself with the compurgatorial oaths of the Archbishop of Tours and the Bishop of Rédon, the canons went privately to those prelates and threatened that in such event they would bring an accusation of perjury and prove it by the ordeal of fire, whereupon the would-be conjurators wisely abandoned their intention, and Norgaud was suspended.[1] I have already referred (p. 51) to a case before the Papal Penitentiary about 1240, in which a priest accused of homicide was put upon his purgation and failed, whereupon his bishop deprived him of function and benefice, and he hastened to Rome with a complaint that the bishop had not been impartial in the selection of compurgators. The most rigid compliance with the requisitions of the law was exacted. Thus the statutes of Nieuport, in 1163, provide a heavy penalty, and in addition pronounce condemnation, when a single one of the conjurators declines the oath.[2] It goes without saying that failure in compurgation was equivalent to conviction or confession.[3]

[1] Hugo. Flaviniac. Lib. II. ann. 1100. Norgaud, however, was reinstated next year by quietly procuring, as we have already seen, two brother prelates to take the oath with him, in the absence of his antagonists.

[2] Et si quis de quinque juvantibus defecerit, accusatus debit tres libras, et percusso decem solidos.—Leg. Secund. Noviportus (Oudegherst).

[3] Hostiensis Aureæ Summæ Lib. v. *De Purg. Canon.* § 7.—"Sicut puniretur de crimine de quo impetebatur si convinceretur considerato modo agendi, sic punietur si in purgatione deficiat."

CHAPTER VII.

DECLINE OF COMPURGATION.

In a system of which the fundamental principle was so vicious, the best efforts of legislation could prove but a slight palliation, and from an early period we find efforts made for its abrogation or limitation. In 983, a constitution of Otho II. abolished it in cases of contested estates, and substituted the wager of battle, on account of the enormous perjury which it occasioned.[1] In England, a more sweeping denunciation, declaring its abolition and replacing it with the vulgar ordeal, is found in the confused and contradictory compilation known as the laws of Henry I.[2]

We have already seen, from instances of later date, how little influence these efforts had in eradicating a custom so deeply rooted in the ancestral prejudices of all the European races. The hold which it continued to enjoy on the popular confidence is well illustrated by the oath which, according to the Romancero, was exacted of Alfonso VI. of Castile, by the Cid to clear him of suspicion of privity to the death of

[1] L. Longobard. Lib. II. Tit. lv. § 34.—Qua ex re mos detestabilis in Italia, improbusque non imitandus inolevit, ut sub legum specie jurejurando acquireret, qui Deum non timendo minime formidaret perjurare.

[2] L. Henrici I. cap. lxiv. § 1. "Malorum autem infestacionibus et perjurancium conspiracione, depositum est frangens juramentum, ut magis Dei judicium ab accusatis eligatur; et unde accusatus cum una decima se purgaret per eleccionem et sortem, si ad judicium ferri calidi vadat." This cannot be considered, however, as having abrogated it even temporarily in England, since it is contradicted by many other laws in the same code, which prescribe the use of compurgators, and we shall see hereafter how persistently its use was maintained.

his brother and predecessor Sancho II. at the siege of Zamora, where he was slain by Bellido Delfos—

" Que nos fagays juramento
Qual vos lo querrán tomar,
Vos y doce de los vuesos,
Quales vos querays juntar,
Que de la muerte del Rey
Non tenedes que culpar . . . .
Ni tampoco della os plugo,
Ni a ella distes lugar."[1]

The same reliance on its efficacy is shown in a little ballad by Audefroi-le-Bâtard, a renowned *trouvère* of the twelfth century:—

LA BELLE EREMBORS.[2]

" Quand vient en mai, que l'on dit as lons jors," etc.

In the long bright days of spring-time,
In the month of blooming May,
The Franks from royal council-field
All homeward wend their way.
Rinaldo leads them onward,
Past Erembors' gray tower,
But turns away, nor deigns to look
Up to the maiden's bower.
Ah, dear Rinaldo!

Full in her turret window
Fair Erembors is sitting,
The love-lorn tales of knights and dames
In many a color knitting.
She sees the Franks pass onward,
Rinaldo at their head,
And fain would clear the slanderous tale
That evil tongues have spread.
Ah, dear Rinaldo!

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[1] Romances Antiguos Españoles. Londres, 1825, T. I. pp. 246–7. Cf. Dozy, Recherches sur l'Histoire, etc. de l'Espagne, Leipzig, 1881, II. 108.

[2] Le Roux de Lincy, Chants Historiques Français, I. 15.

"Sir knight, I well remember
When you had grieved to see
The castle of old Erembors
Without a smile from me."
"Your vows are broken, princess,
Your faith is light as air,
Your love another's, and of mine
You have nor reck nor care."
Ah, dear Rinaldo!

"Sir knight, my faith unbroken,
On relics I will swear;
A hundred maids and thirty dames
With me the oath shall share.
I've never loved another,
From stain my vows are free.
If this content your doubts and fears,
You shall have kisses three."
Ah, dear Rinaldo!

Rinaldo mounts the staircase,
A goodly knight, I ween,
With shoulders broad and slender waist,
Fair hair and blue eyes keen.
Earth holds no youth more gifted
In every knightly measure;
When Erembors beholds him,
She weeps with very pleasure.
Ah, dear Rinaldo!

Rinaldo in the turret
Upon a couch reposes,
Where deftly limned are mimic wreaths
Of violets and of roses.
Fair Erembors beside him
Sits clasped in loving hold,
And in their eyes and lips they find
The love they vowed of old!
Ah, dear Rinaldo!

In England, although as we have seen (p. 57), the wager of law was the customary resource of the manorial courts in disputed questions, the shrewd and intelligent lawyers who were

building up and systematizing the practice of the royal courts were disposed to limit it as much as possible in criminal cases. Towards the close of the twelfth century, Glanville compiled his excellent little treatise "De legibus Angliæ," the first satisfactory body of legal procedure which the history of mediæval jurisprudence affords. Complete as this is in all the forms of prosecution and defence, the allusions to conjurators are so slight as to show that already they were employed rather on collateral points than on main questions. Thus a defendant who desired to deny the serving of a writ could swear to its non-reception with twelve conjurators;[1] and a party to a suit, who had made an unfortunate statement or admission in court, could deny it by bringing forward two to swear with him against the united recollections and records of the whole court.[2] The custom, however, still maintained its hold on popular confidence. In 1194, when Richard I. undertook, after his liberation, to bring about a reconciliation between his chancellor William, Bishop of Ely, and the Archbishop of York, one of the conditions was that the chancellor

[1] Glanville, Lib. I. cap. ix. Also, Lib. I. c. xvi., Lib. IX. c. i., Lib. X. c. v.

[2] "In aliis enim curiis si quis aliquid dixerit unde eum pœnituerit, poterit id negare contra totam curiam tertia manu cum sacramento, id se non dixisse affirmando" (Ibid. Lib. VIII. c. ix.).—In some other systems of jurisprudence. this unsophisticated mode of beclouding justice was obtained by insisting on the employment of lawyers, whose assertions would not be binding on their clients. Thus, in the Assises de Jerusalem (Baisse Court, cap. 133): "Et por ce il deit estre lavantparlier, car se lavantparlier dit parole quil ne doie dire por celuy cui il parole, celui por qui il parle et son conceau y pueent bien amender ains que le iugement soit dit. Mais se celuy de cui est li plais diseit parole qui li deust torner a damage, il ne la peut torner arieres puis quil la dite." The same caution is recommended in the German procedure of the fourteenth century—"verbis procuratoris non eris adstrictus, et sic vitabis damnum" (Richstich Landrecht, cap. II. Cf. Jur. Provin. Saxon. Lib. I. art. 60; Lib. II. art. 14). The same abuse existed in France, but was restricted by St. Louis, who made the assertion of the advocate binding on the principal, unless contradicted on the spot (Établissements, Liv. II. chap. xiv.).

should swear with a hundred priestly compurgators that he had neither caused nor desired the arrest of the archbishop.[1] In the next century Bracton alludes to the employment of conjurators in cases of disputed feudal service between a lord and his vassal, wherein the utmost exactness was rigidly required both as to the number and fitness of the conjurators,[2] and we shall see that no formal abrogation of it took place until the nineteenth century. An outgrowth of the custom, moreover, was the Inquest of Fame, by which "the general character of the accused, as found by a jury, was accepted as an indication of the guilt or innocence of the prisoner."[3]

Soon after the time of Glanville, the system of compurgation received a severe shock from its most important patron, the church. As stated above, in proceedings between ecclesiastics, it was everywhere received as the appropriate mode of deciding doubtful cases. At the same time the absolute character of the compurgatorial oath was too strong an incentive to perjury, ignorant or wilful, for conscientious minds to reconcile themselves to the practice, and efforts commenced to modify it. About 1130 Innocent II., in prescribing compurgation for the Bishop of Trent, accused of simony, orders that the oath of the conjurators shall be simply as to their belief in the bishop's oath.[4] Gratian inserted this in his *Decretum*, and a commentator soon afterwards speaks of it as an opinion held by some authorities.[5] It was reserved for Innocent III. to give this the full sanction of law as a general

[1] Roger. de Hoveden ann. 1194.

[2] Tunc vadiabit defendens legem se duodecima manu.—Bracton. Lib. III. Tract. iii. cap. 37, § 1.—Et si ad diem legis faciendæ defuerit aliquis de XII. vel si contra prædictos excipi possit quod non sunt idonei ad legem faciendam, eo quod villani sunt vel alias idonei minus, tunc dominus incidet in misericordiam.—Ibid. § 3. So also in Lib. v. Tract. v. cap. xiii. § 3.

[3] Pike, History of Crime in England, I. 285.

[4] Gratian, c. 17, C. II. Q. v.—"Deinde vero purgatores super sancta Dei evangelia jurabunt quod sicut ipsi credunt verum juravit." Cf. c. 5 Extra, v. xxxiv.

[5] Summæ Stephani Tornacensis caus. II. Q. 5 (Schulte, 1891, p. 171).

regulation. Compurgation was too valuable a resource for churchmen to be discarded, and he endeavored to check the abuses to which it led, by demanding conjurators of good character, whose intimacy with the accused would give weight to their oaths.[1] At the same time, in endeavoring to remove one of the objections to its use, he in reality destroyed one of its principal titles to respect, for in decreeing that compurgators should only be obliged to swear to their belief in the truth of the principal's oath,[2] he attacked the very foundation of the practice, and gave a powerful impulse to the tendency of the times no longer to consider the compurgator as sharing the guilt or innocence of the accused. Such an innovation could only be regarded as withdrawing the guarantee which had immemorially existed. To recognize it as a legal precept was to deprive the proceeding of its solemnity and to render it no longer a security worthy the confidence of the people or sufficient to occupy the attention of a court of justice.

In the confusion arising from the long and varying contest as to the boundaries of civil and ecclesiastical jurisdiction, it is not easy to determine the exact influence which this decretal may have exercised directly in secular jurisprudence. We have seen above that the ancient form of absolute oath was still employed without change until long after this period, but the moral effect of so decided a declaration from the head of the Christian church could not but be great. Another influence, not less potent, was also at work. The revival of the study of the Roman jurisprudence, dating from

[1] C. 7, Extra, v. xxxiv.

[2] Illi qui ad purgandam alicujus infamiam inducuntur, ad solum tenentur juramento firmare quod veritatem credunt eum dicere qui purgatur.—C. 13, Extra, v. xxxiv. Innocent also endeavored to put an end to the abuse by which ecclesiastics, notoriously guilty, were able to escape the penalty due their crimes, by this easy mode of purgation.—C. 15, eod. loc.

The formula as given about 1240 by St. Ramon de Peñafort is "Nos credimus quod ipse juravit verum, vel, verum esse quod juravit."—Raymondi Summæ Lib. III. Tit. xxxi. § 5.

about the middle of the twelfth century, soon began to exhibit the results which were to work so profound a change in the legal maxims and principles of half of Europe.[1] The criminal procedure of the Barbarians had rested to a great degree on the system of negative proofs. In the absence of positive evidence of guilt, and sometimes in despite of it, the accused was bound to clear himself by compurgation or by the ordeal.

[1] The rapidity with which the study of the civil law diffused itself throughout the schools and the eagerness with which it was welcomed were the subject of indignant comment by the ecclesiastics of the day. As early as 1149 we find St. Bernard regretting that the laws of Justinian were already overshadowing those of God—"Et quidem quotidie perstrepent in palatio leges, sed Justiniani, non Domini" (De Consideratione, Lib. I. cap. iv.). Even more bitter were the complaints of Giraldus Cambrensis towards the end of the century. The highest of high churchmen, in deploring the decline of learning among the prelates and clergy of his age, he attributes it to the exclusive attention bestowed on the jurisprudence of Justinian, which already offered the surest prizes to cupidity and ambition, and he quotes in support of his opinion the dictum of his teacher Mainier, a professor in the University of Paris: "Episcopus autem ille, de quo nunc ultimo locuti sumus, inter superficiales numerari potuit, cujusmodi hodie multos novimus propter leges Justinianas, quæ literaturam, urgente cupiditatis et ambitionis incommodo, adeo in multis jam suffocarunt, quod magistrum Mainerium in auditorio scholæ suæ Parisius dicentem et damna sui temporis plangentem, audivi, vaticinium illud Sibillæ vere nostris diebus esse completum, hoc scilicet 'Venient dies, et væ illis, quibus leges obliterabunt scientiam literarum'" (Gemm. Ecclesiast. Dist. II. cap. xxxvii.). This, like all other branches of learning, was as yet to a great extent in the hands of the clergy, though already were arising the precursors of those subtle and daring civil lawyers who were destined to do such yeoman's service in abating the pretensions of the church.

It is somewhat singular to observe that at a period when the highest offices of the law were frequently appropriated by ecclesiastics, they were not allowed to perform the functions of advocates or counsel. See Horne's Myrror of Justice, cap. II. sect. 5. There was good reason for prohibiting them from serving as judges, as Frederic II. did in 1235—"Idem erit laicus propter sententias sanguinum quas clerico scribere non liceat, et præterea ut si dilinquid in officio suo pena debita puniatur" (Nove Constitutiones Dom. Alberti, p. 46).

The cooler and less impassioned justice of the Roman law saw clearly the futility of such attempts, and its system was based on the indisputable maxim that it is morally impossible to prove a negative—unless, indeed, that negative should chance to be incompatible with some affirmative susceptible of evidence—and thus the onus of proof was thrown upon the accuser.[1] The civil lawyers were not long in recognizing the truth of this principle, and in proclaiming it far and wide. The Spanish code of Alfonso the Wise, in the middle of the thirteenth century, asserts it in almost the same words as the Roman jurisconsult.[2] Not long before, the Assises de Jerusalem had unequivocally declared that "nul ne peut faire preuve de non;" and Beaumanoir, in the *Coutumes du Beauvoisis*, approvingly quotes the assertion of the civil doctors to the same effect, "Li clerc si dient et il dient voir, que negative ne doit pas quevir en proeve."

Abstract principles, however, though freely admitted, were not yet powerful enough to eradicate traditional customs rooted deeply in the feelings and prejudices of the age. The three bodies of law just cited contradict their own admissions, in retaining with more or less completeness the most monstrous of negative proofs—the ordeal of battle—and the introduction of torture soon after exposed the accused to the chances of the negative system in its most atrocious form. Still these codes show a marked progress as relates to the kindred procedure of compurgation. The Partidas, promulgated about 1262, record

[1] Actor quod adseverat, probare se non posse profitendo, reum necessitate monstrandi contrarium non adstringit: cum per rerum naturam factum negantis probatio nulla sit (Const. xxiii. C. de Probat. IV. 19).—Cum inter eum, qui factum adseverans, onis subiit probationis, et negantem numerationem, cujus naturali ratione probatio nulla est . . . magna sit differentia (Const. x. C. de non numerat. IV. 30). It is a little curious to see how completely this was opposed to the principle of the early Common Law of England, by which in actions for debt "semper incumbit probatio neganti" (Fleta, Lib. II. cap. lxiii. § 11).

[2] La cosa que non es non se puede probar nin mostrar segunt natura.—Las Siete Partidas, P. III. Tit. xiv. l. 1.

the convictions of an enlightened ruler as to what should be law rather than the existing institutions of a people, and were not accepted as authoritative until the middle of the fourteenth century. The absence of compurgation in Spain, moreover, was a direct legacy from the Wisigothic code, transmitted in regular descent through the Fuero Juzgo.[1] The Assises de Jerusalem is a more precious relic of mediæval jurisprudence. Constructed as a code for the government of the Latin kingdoms of the East, in 1099, by order of Godfrey of Bouillon, it has reached us only in the form assumed about the period under consideration, and as it presents the combined experience of the warriors of many Western races, its silence on the subject of conjurators is not a little significant. The work of Beaumanoir, written in 1283, is not only the most perfect embodiment of the French jurisprudence of his time, but is peculiarly interesting as a landmark in the struggle between the waning power of feudalism and the Roman theories which gave intensity of purpose to the enlightened centralization aimed at by St. Louis: and Beaumanoir likewise passes in silence over the practice of compurgation, as though it were no longer an existing institution. All these legislators and lawyers had been preceded by the Emperor Frederic II., who, in 1231, promulgated his "Constitutiones Sicularum" for the government of his Neapolitan provinces. Frederic was Latin, and not Teutonic, both by education and predilection, and his system of jurisprudence is greatly in advance of all that had preceded it. That conjurators should

[1] Though absent from the general laws of Spain, yet compurgation had been introduced as an occasional custom. We have seen it above (p. 49) in the Fuero de Balbás in 1135. The Fuero of Madrid in 1202 provides that a man suspected of homicide and other crimes, in the absence of testimony, can clear himself with six or twelve conjurators, according to the grade of the offence (Mem. de la Real. Acad. de la Historia, 1852). We shall see hereafter that it appears in the Fuero Viejo of Castile in 1356. The passage from the Romancero del Cid, quoted above, shows the hold it had on the popular imagination.

find no place in his scheme of legal procedure is, therefore, only what might be expected. The collection of laws known as the *Établissements* of St. Louis is by no means a complete code, but it is sufficiently copious to render the absence of all allusion to compurgation significant. In fact, the numerous references to the Digest show how strong was the desire to substitute the Roman for the customary law, and the efforts of the king to do away with all negative proofs of course included the one under consideration. The same may be said of the *Livres de Jostice et de Plet* and the *Conseil* of Pierre de Fontaines, two unofficial books of practice, which represent with tolerable fulness the procedures in vogue during the latter half of the thirteenth century; while the *Olim*, or records of the Parlement of Paris, the king's high court of justice, show that the same principles were kept in view in the long struggle by which that body succeeded in extending the royal jurisdiction at the expense of the independence of the vainly resisting feudatories. In the *Olim* from 1254 to 1318, I can find but two instances in which compurgation was required—one in 1279 at Noyon, and one in 1284 at Compiègne. As innumerable decisions are given of cases in which its employment would have been equally appropriate, these two can only be regarded as exceptional, and the inference is fair that some local custom rendered it impossible to refuse the privilege on these special occasions.[1]

All these were the works of men deeply imbued with the spirit of the resuscitated jurisconsults of Rome. Their labors bear testimony rather to the influences tending to overthrow the institutions bequeathed by the Barbarians to the Middle Ages, than to a general acceptance of the innovations attempted. Their authority was still circumscribed by the innumerable jurisdictions which yet defied their gradual encroachments and resolutely maintained ancestral customs. Thus, in 1250, we find in the settlement of a quarrel between

[1] Olim, II. 153, 237.

Hugues Tirel Seigneur of Poix in Picardy and the commune of that place, that one of the articles was to the effect that the mayor with thirty-nine of the bourgeois should kneel before the dame de Poix and offer to swear that an insult inflicted on her had not been done, or that if it had, it had been in honor of the Seigneur de Poix.[1] Even an occasional instance may be found where the central power itself permitted the use of compurgation, showing how difficult it was to eradicate the prejudices transmitted through ages from father to son, and that the policy adopted by St. Louis and Philippe le Bel, aided by the shrewd and energetic civil lawyers who assisted them so ably, was not in all cases adhered to. Thus, in 1283, when the bailli of Amiens was accused before the Parlement of Paris of having invaded the privileges of the church by trying three clerks accused of crime, it was decided that he should swear with six compurgators as to his ignorance that the criminals were ecclesiastics.[2] So, in 1303, a powerful noble of the court of Philippe le Bel was accused of a foul and treacherous murder, which a brother of the victim offered to prove by the wager of battle. Philippe was endeavoring to abolish the judicial duel, and the accused desired strongly to escape that ordeal. He was accordingly condemned to clear himself of the imputed crime by a purgatorial oath with ninety-nine nobles, and at the same time to satisfy the fraternal claim of vengeance with an enormous fine[3]—a decision which offers the best practical commentary on the degree of faith reposed in this system of purgation. Even the Parlement of Paris in 1353 and a rescript of Charles le Sage in 1357 allude to compurgation as still in use and of binding force.[4]

[1] Actes du Parlement de Paris, T. I. p. cccvii. (Paris, 1863).

[2] Actes du Parlement de Paris, T. I. p. 382.

[3] Statuunt . . . se manu centesima nobilium se purgare, et ad huic benedicto juveni bis septem librarum milia pro sui rancoris satisfactione præsentare.—Wilelmi Egmond. Chron.

[4] Is qui reus putatur tertia manu se purgabit, inter quos sint duo qui dicentur denominati.—Du Cange s. v. *Juramentum.*

It was in the provinces, however, that the system manifested its greatest vitality, protected both by the stubborn dislike to innovation and by the spirit of independence which so long and so bitterly resisted the centralizing efforts of the crown. The Roman law concentrated all power in the person of the sovereign, and reduced his subjects to one common level of implicit obedience. The genius of the barbaric institutions and of feudalism localized power. The principles were essentially oppugnant, and the contest between them was prolonged and confused, for neither party could in all cases recognize the ultimate result of the minuter points involved, though each was fully alive to the broad issues of the struggle.

How obstinate was the attachment to bygone forms may be understood when we see even the comparatively precocious civilization of a city like Lille preserve the compurgatorial oath as a regular procedure until the middle of the fourteenth century, even though the progress of enlightenment had long rendered it a mere formality, without serious meaning. Until the year 1351, the defendant in a civil suit was obliged to substantiate the oath of denial with two conjurators of the same sex, who swore to its truth, to the best of their belief.[1] The minutest regulations were enforced as to this ceremony, the position of every finger being determined by law, and though it was the veriest formality, serving merely as an introduction to the taking of testimony and the legal examination of the case, yet the slightest error committed by either party lost him the suit irrecoverably.[2]

[1] Et li deffendans, sour qui on a clamet se doit deffendre par lui tierche main, se chou est hom II. hommes et lui, se chou est fame II. femmes et li à tierche. . . . "Tel sierment que Jehans chi jura boin sierment y jura au mien ensiant. Si m'ait Dius et chist Saint."—Roisin, Franchises, etc. de la Ville de Lille, pp. 30, 35.

[2] Ibid. p. 51. The system was abrogated by a municipal ordinance of September, 1351, in accordance with a special ordonnance to that effect issued by King John of France in March, 1350.

The royal ordonnance declares that the oath was "en langage estraigne

Normandy was even more faithful to the letter of the ancient traditions. The Coutumier in use until the revision of 1583 under Henry III. retains a remnant of the practice under the name of *desrene*, by which, in questions of little moment, a man could rebut an accusation with two or four compurgators, even when it was sustained by witnesses. The form of procedure was identical with that of old, and the oath, as we have already seen (page 58), was an unqualified assertion of the truth of that of the accused.[1] Practically, however, we may assume that the custom had become obsolete, for the letters patent of Henry III., ordering the revision in 1577, expressly state that the provisions of the existing laws "estoient la plus-part hors d'usage et peu ou point entendu des habitants du pays;" and that compurgation was one of the forgotten formulas may fairly be inferred from the fact that Pasquier, writing previous to 1584, speaks of it as altogether a matter of the past.[2]

The fierce mountaineers of Béarn were comparatively inaccessible to the innovating spirit of the age, and preserved their feudal independence amid the progress and reform of the sixteenth century long after it had become obsolete elsewhere throughout Southern Europe. Accordingly, we find the practice of compurgation maintained as a regular form of procedure in the latest revision of their code, made by Henry II.

et de mos divers et non de legier a retenir ou prononchier," and yet that if either party "par quelconques maniere falo.t en fourme ou en langage ou que par fragilite de langhe, huirans eu, se parolle faulsist ou oubvliast, ou eslevast se main plus que li dite maniere acoustumee en requeroit ou quelle ne tenist fermement sen poch en se paulme ou ne wardast et maintenist pluiseurs autres frivoles et vaines chozes et manieres appartenans au dit sierment, selonc le loy de la dite ville, tant em parole comme en fait, il avoit du tout sa cause perdue, ne depuis nestoit rechus sur che li demanderes a claim ou complainte, ne li deffenderes a deffensce."—Ibid. p. 390.

[1] Anc. Coutume de Normandie, chap. lxxxv. (Bourdot de Richebourg, IV. 53–4).

[2] Recherches de la France, Liv. IV. chap. iii. Concerning the date of this, see La Croix du Maine, s. v. *Estienne Pasquier*.

of Navarre in 1551, which continued in force until the eighteenth century.[1] The influence of the age is shown, however, even there, in a modification of the oath, which is no longer an unreserved confirmation of the principal, but a mere affirmation of belief.[2]

In Castile, a revival of the custom is to be found in the code compiled by Pedro the Cruel, in 1356, by which, in certain cases, the defendant was allowed to prove his innocence with the oath of eleven hidalgos.[3] This, however, is so much in opposition to the principles of the Partidas, which had but a few years previous been accepted as the law of the land, and is so contrary to the spirit of the Ordenamiento de Alcalà, which continued in force until the fifteenth century, that it can only be regarded as a tentative resuscitation of mere temporary validity.

The Northern races resisted more obdurately the advances of the reviving influence of the Roman law. Though we have seen Frederic II. omitting all notice of compurgation in the code prepared for his Neapolitan dominions in 1231, he did not attempt to abrogate it among his German subjects, for it is alluded to in a charter granted to the city of Regensburg in 1230.[4] The Schwabenspiegel, which during the thirteenth and fourteenth centuries was the municipal law of Southern Germany, directs the employment of conjurators in various classes of actions which do not admit of direct testimony.[5]

[1] Fors et Cost. de Béarn, Rubr. de Juramentz (Bourdot de Richebourg, IV. 1082).

[2] Lo jurament deu seguidor se fé JURAN PER aquetz sanctz bertat ditz exi que io crey.

[3] E si gelo negare e non gelo quisier probar, devel' facer salvo con once Fijosdalgo e èl doceno, que non lo fiço (Fuero Viejo de Castiella, Lib. I. Tit. v. 1. 12). It will be observed that this is an unqualified recognition of the system of negative proofs.

[4] Du Cange, s. v. *Juramentum.*

[5] Jur. Provin. Alaman. cap. xxiv.; cccix. § 4; cccxxix. §§ 2, 3; cccxxxix. § 3 (Edit. Schilteri).

The code in force in Northern Germany, as we have already seen, gave great facilities for rebutting accusations by the single oath of the defendant, and therefore the use of conjurators is but rarely referred to in the Sachsenspiegel, though it was not unknown, for either of the parties to a judicial duel could refuse the combat by procuring six conjurators to swear with him that he was related to his antagonist.[1] In the Saxon burgher law, however, the practice is frequently alluded to, and it would seem from various passages that a man of good character who could get six others to take with him the oath of denial was not easily convicted. But where there was satisfactory proof, compurgation was not allowed, and in homicide cases, if a relative of the slain decided to proceed by the duel, his claim of vengeance was supreme, and no other process was admissible.[2] It is evident, however, that compurgation retained its hold on popular respect when we see, about 1300, the Emperor Albert I. substituting it for the duel in a considerable class of criminal cases.[3] In the early part of the sixteenth century, Maximilian I. did much to diminish the use of the compurgatorial procedure,[4] but that he failed to eradicate it entirely is evident from a constitution issued by Charles V. in 1548, wherein its employment is enjoined in doubtful cases in a manner to show that it was an existing resource of the law, and that it retained its hold upon public confidence, although the conjurators were only required to swear as to their belief in the oath of their principal.[5]

In the Netherlands it likewise maintained its position.

[1] Jur. Provin. Saxon. Lib. I. c. 63.

[2] Sachsische Weichbild, art. 71, 72, 86, 40, 88.

[3] Goldast. Constitt. Imp. III. 446.

[4] Meyer, Institutions Judiciaires, V. 221.

[5] Sique accusatus tanta ac tam gravi suspitione laboraret ut aliorum quoque purgatione necesse esset, in arbitratu stet judicis, si illi eam velit injungere, nec ne, qui nimirum compurgatores jurabunt, se credere quod ille illive qui se per juramentum excusarunt, recte vereque juraverint.—Constit. de Pace Publica cap. xv. § 1 (Goldast. Constitt. Imp. I. 541).

Damhouder, writing in 1554, after describing its employment in the Courts Christian, adds that by their example it was occasionally used also in secular tribunals.[1]

In Scotland, as late as the middle of the fourteenth century, its existence is proved by a statute which provides that if a thief escaped from confinement, the lord of the prison should clear himself of complicity with the evasion by the oaths of thirty conjurators, of whom three were required to be nobles.[2]

The Scandinavian nations adhered to the custom with even greater tenacity. In the code of Haco Haconsen, issued towards the close of the thirteenth century, it appears as the basis of defensive procedure in almost all criminal cases, and even in civil suits its employment is not infrequently directed, the number of conjurators being proportioned to the nature of the crime or to the amount at stake, and regulations for administering the oath being given with much minuteness.[3] In Denmark it was not abolished until near the middle of the seventeenth century, under Christiern IV., after it had become a crying abuse through the habit of members of families, and even of whole guilds, entering into formal engagements to support each other in this manner.[4] The exact date of its abrogation is a matter of uncertainty, and the stubbornness with which the people clung to it is shown by the fact that even in 1683 Christiern V., in promulgating a new code, found it necessary formally to prohibit accused persons from being forced to provide conjurators.[5] In Sweden, its existence was similarly prolonged. Directions for its use are contained in the code which was in force until the seventeenth

[1] Damhouder. Rerum Criminalium Praxis cap. xliv. No. 6 (Antwerp. 1601).

[2] Statut. Davidis II. cap. i. § 6.

[3] Jarnsida, Mannhelge & Thiofa-Balkr *passim;* Erfthatal cap. xxiv.; Landabrigtha-Balkr cap. xxviii.; Kaupa-Balkr cap. v., ix., etc.

[4] See Sporon & Finsen, Dissert. de Usu Juramenti juxta Leges Daniæ Antiquas, Havniae 1815-17, P. I. pp. 160-1, P. II. pp. 206-8.

[5] Christiani V. Jur. Danic. Lib. i. c. xiv. § 8.

century ;[1] it is constantly alluded to in the laws of Gustavus Adolphus ;[2] and an edict of Charles XI. in 1662 reproves the readiness with which men were everywhere prompt to serve as compurgators, and requires the judges, before admitting them, to investigate whether they are proper persons and what are their reasons to believe in the innocence of their principal.[3] By this time, therefore, though not yet witnesses, they were becoming assimilated to them.

The vitality of communal societies among the Slavs naturally led to the maintenance of a custom which drew its origin from the solidarity of families, and it is therefore not surprising to find it in Poland described as in full force as late as the eighteenth century, the defendant being obliged to support his purgatorial oath with conjurators, who swore as to its truth.[4] Yet among the Poles confidence in it as a legal proof had long been undermined. In 1368 Casimir III. decreed that a man of good repute, when accused of theft, could clear himself by his own oath ; but if his character was doubtful, and compurgation was prescribed, then if he fell short by one conjurator of the number required, he should satisfy the accuser, though he should not be rendered infamous for the future. This led to an increase of crime, and a hundred years later Casimir IV. proclaimed a law by which compurgation was only allowed three times, after which a persistent offender was abandoned to the full severity of the law, as being presumably guilty and not deserving of escape. At the same time any one summoned to compurgation, and appearing before the judge without compurgators, was *ipso facto* pronounced infamous. From a case recorded it would appear that twelve conjurators were required to outweigh the

[1] Poteritque se tunc purgare cui crimen imponitur juramento XVIII. virorum.—Ragnald. Ingermund. Leg. Suecorum Lib. i. c. xvi.

[2] Legg. Civil. Gustavi Adolphi Tit. x.

[3] Caroli XI. Judicum Regulæ, cap. xxxii.

[4] Ludewig. Reliq. MSS. T. VII. p. 401.

single oath of the accuser.[1] Among the southern Slavs the custom was likewise preserved to a comparatively late date. An edict of Hermann, Ban of Slavonia, in 1416, orders that any noble accused of neglect to enforce a decree of proscription against a malefactor, should purge himself with five of his peers as conjurators, in default of which he was subject to a fine of twenty marcs.[2]

The constitutional reverence of the Englishman for established forms and customs, however, nominally preserved this relic of barbarism in the common law to a period later by far than its disappearance from the codes of other nations. The system of inquests and ordeals established by the Assize of Clarendon in 1166 and the rise of the jury system led to its being superseded in criminal matters, but in civil suits it held its own. According to Bracton, in the thirteenth century, in all actions arising from contracts, sales, donations, etc., when there was no absolute proof, the plaintiff came into court with his *secta*, and the defendant was bound to produce two conjurators for each one advanced by the plaintiff, the evidence apparently preponderating according to quantity rather than quality.[3] From the context, it would appear that the

[1] Herb. de Fulstin Statut. Reg. Poloniæ. Samoscii, 1597, pp. 186-88, 465.

By the customs of Iglau, about the middle of the thirteenth century, a man could rebut with two conjurators a charge of assault with serious mutilation, and was subject to a fine of fourteen marks if he failed; accusations of complicity required only the oath of the accused.—Statuta Primæva Moraviæ, Brunæ, 1781, pp. 103–4.

[2] Bassani de Sacchi Jura Regni Croatiæ, Dalmatiæ et Sclavoniæ. Zagrabiæ, 1862, Pt. I. p. 182.

[3] Et sic major præsumptio vincit minorem. Si autem querens probationem habuerit, sicut instrumenta et chartas sigillatas, contra hujusmodi probationes non erit defensio per legem. Sed si instrumento contradicatur, fides instrumenti probabitur per patriam et per testes. Bracton. Lib. IV. Tract. vi. cap. 18, § 6.

The word "secta" is a troublesome one to legal antiquarians from its diverse significations. As used in the above text it means the supporters

secta of the plaintiff consisted of his friends and followers willing to take the oath with him, but not absolutely witnesses. The Fleta, however, some twenty-five years later, uses the term in the sense of witnesses, and in actions of debt directs the defence to be made with conjurators double in number the plaintiff's witnesses,[1] thus offering an immense premium on dishonesty and perjury. Notwithstanding this, the nobles and gentry who came to London to attend the court and Parliament apparently were subjected to many annoyances by the citizens who strove to collect their debts, and in 1363 Edward III. relieved them by abrogating the wholesome rule laid down by Bracton, and enacting that a debtor could wage his law with a sufficient number of conjurators in spite of any papers put forward in evidence by the creditor, who is curtly told to find his remedy in some other way.[2] The unquestionable advantages which this offered to not the least influential part of a feudal community probably had something to do with its preservation. The "Termes de la Ley," compiled in the early part of the sixteenth century, states as the existing practice that "when one shall wage his law, he shall bring with him 6, 8, or 12 of his neighbors, as the court shall assign him, to swear with him;" and when in a statute of 1585 imposing severe fines for using wood or charcoal in iron manufacture it is provided that offenders shall not be entitled to defence by

of the plaintiff's case. Elsewhere we find it denoting the hue and cry, which all men were bound to follow; see Stubb's Select Charters, pp. 256, 366, etc. "Facere sectam" also seems to have the sense of holding court (Ib. p. 303), whence it also derives a secondary meaning of jurisdiction (Baildon, Select Civil Pleas, I. 42).

[1] Fleta, Lib. II. c. lxiii. § 10. Sed si sectam [actor] produxerit, hoc est testimonium hominum legalium qui contractui inter eos habito interfuerint præsentes, qui a judice examinati si concordes inveniantur, tunc poterit [reus] vadiare legem suam contra petentem et contra sectam suam prolatam; ut si duos vel tres testes produxerit [actor] ad probandum, oportet quod defensio fiat per quatuor vel per sex; ita quod pro quolibet teste duos producat jurat [ores] usque ad xii.

[2] 38 Edw. III. St. 1. cap. v. (Statutes at Large I. 319. Ed. 1769).

the wager of law, it shows that proceeding to be still in common use, though it was recognized as a means of eluding justice.[1] Style's "Practical Register," published in 1657, also describes the process, but an absurd mistake as to the meaning of the traditional expression "jurare manu" shows that the matter was rather a legal curiosity than a procedure in ordinary use; and, indeed, the author expressly states that the practice having been "abused by the iniquity of the people, the law was forced to find out another way to do justice to the nation." Still the law remained unaltered, and a case is recorded occurring in 1708, known as Gunner's case, where "the plaintiff became nonsuit, when the defendant was ready to perfect his law,"[2] and Jacob, in his "Review of the Statutes," published not long after, treats of it as still part of the existing judicial processes. As the wager of law came to be limited to simple actions of debt, shrewd lawyers found means of avoiding it by actions of "trespass upon the case," and other indirect forms which required the intervention of a jury, but Burn in his Law Dictionary (Dublin, 1792) describes the whole process with all its forms as still existing, and in 1799 a case occurred in which a defendant successfully eluded the payment of a claim by producing compurgators who "each held up his right hand, and then laid their hands upon the book and swore that they believed what the defendant swore was true." The court endeavored to prevent this injustice, but was forced to accept the law of the land. Even this did not provoke a change. In 1824, in the case of King *v.* Williams (2 Barnewell & Cresswell, 528), some black-letter lawyer revived the forgotten iniquity for the benefit of a client in want of testimony, and demanded that the court should prescribe the number of conjurators necessary for the defence, but the court refused assistance, desiring to give the plaintiff the benefit of any mistake that might be made. Williams then got together eleven conjurators, and appeared in court

[1] 27 Eliz. cap. xix. § 1.

[2] Jacob's Review of the Statutes, 2d Ed. London, 1715, p. 532.

with them at his back, when the plaintiff, recognizing the futility of any further proceedings, abandoned his case in disgust.[1] Still, the fine reverential spirit postponed the inevitable innovation, and it was not until 1833 that the wager of law was formally abrogated by 3 and 4 William IV., c. 42, s. 13.[2]

English colonists carried the ancestral custom across the sea and seem to have resorted to it as an infallible mode of settling certain cases for which no positive evidence could be had. Small as was the infant colony of Bermuda, its court records for a little more than six months show four instances of its use, all of which occur in deciding cases of "suspition of incontinency" regularly presented by the grand jury or the ecclesiastical authorities.[3]

[1] I owe a portion of these references to a paper in the London "Jurist" for March, 1827, the writer of which instances the wager of law as an evidence of "that jealous affection and filial reverence which have converted our code into a species of museum of antiques and legal curiosities."

[2] Wharton's Law Lexicon, 2d ed., p. 758.

[3] I owe a transcript of these records to the kindness of the late General J. H. Lefroy, then Governor of Bermuda. The quaintness of the proceedings may justify the printing of the sentences.

Nov. Assizes, 1638.—"Arthur Thorne being presented by the minister and church wardens of Pembroke tribe [parish] upon suspition of incontinency with Elizabeth Jenour the wyfe of Mr. Anthony Jenour, was censured [sentenced] in case he could not purge himself to doe open penaunce in two churches." He probably failed in his purgation, for Mrs. Jenour confessed her sin in open court and was referred to her minister for penance.

June Assizes, 1639. "The minister, church wardens, and sydesmen of Sandy's Tribe doe present Mary Eldrington, the wyfe of Roger Eldrington, upon suspition of incontinency grounded on comon fame: upon which presentment she was censured to doe open penaunce in the church in case she could not purge herselfe by the oath of 3 women of credit in the Tribe."

"Edward Bowly, presented upon suspition of incontinency with Anne, a negro woman, supposed to be the father of her bastard child, was put to his compurgators, and did thereupon purge himself, and the negro woman censured to receave 21 lashes at the whipping-post, which was executed upon her."

"Edward Wolsey and Dorathie Penniston were presented upon common fame for suspition of incontinencie by the grand inquest, and also presented

Doubtless if the early records of Virginia and Massachusetts could be searched similar evidence of its use would be found in them. Indeed it is quite possible that, strictly speaking, the wager of law may still preserve a legal existence in this country. In 1712 an act of the Colony of South Carolina, enumerating the English laws to be held as in force there, specifically includes those relating to this mode of defence, and I am not aware that they have ever been formally abrogated.[1] In 1811 Chancellor Kilty, of Maryland, speaks of the wager of law as being totally disused in consequence of the avoidance of the forms of suit which might admit of its employment, but he evidently regards it as not then specifically abolished.[2]

While the common sense of mankind was gradually eliminating the practice from among the recognized procedures of secular tribunals, the immutable nature of ecclesiastical observances prolonged its vitality in the bosom of the church. We have seen above that Innocent III., about the commencement of the thirteenth century, altered the form of oath from an unqualified confirmation to a mere assertion of belief in the innocence of the accused. That this at once became the standard formula in ecclesiastical cases is probable when we find it adopted for the oaths of the compurgators who, during the Albigensian persecution, were required by the nascent Inquisition in all cases to assist in the purgation of such suspected heretics as were allowed to escape so easily.[3] And

by the minister and churchwardens of Pembroke Tribe upon the like suspition, whereupon they were sentenced to doe penaunce in the church, standing in a whyte sheete during divine service, making confession of that their suspitious walking in case they could not purge themselves by their owne oathes and two sufficient compurgators."

[1] Cooper's Statutes at Large of South Carolina, Columbia, 1837, II. 403.

[2] Kilty's Report on English Statutes, Annapolis, 1811, p. 140.

[3] Ego talis juro . . . me firmiter credere quod talis non fuit Insabbatus, Valdensis, vel pauperum de Lugduno . . . et credo firmiter eum in hoc jurasse verum.—Doctrina de modo procedendi contra Hæreticos (Mar-

this is no doubt the "congruous purgation" to which Innocent III. and Gregory IX. alluded as that by which suspected heretics should clear themselves.[1] Zealous inquisitors, however, paid little attention to such forms which allowed their victims a chance of escape, for it is related of Conrad of Marburg, who for a short time spread terror and desolation throughout Germany, that when the accused confessed he subjected them to torture and the frightful penance provided by the church, but that when they denied their guilt he sent them at once to the stake. The compurgatorial process, however, vindicated itself in a notable manner when Conrad's cruelties at length aroused effective opposition. Count Sayn, whom he had accused, was virtually acquitted at the Council of Mainz, July, 1233, soon after which Conrad was assassinated: the count, however, required formal vindication, and at the Diet of Frankfort, in February, 1234, he cleared himself of the charge of heresy in the most imposing manner with a train of compurgators comprising eight bishops, twelve Cistercian abbots, twelve Franciscan and three Dominican monks, and a number of Benedictine abbots, clergy, and noble laymen. After this, in April, the Council of Mainz declared him and others of Conrad's victims to be innocent and to be restored to reputation and to their possessions.[2]

The practice of compurgation thus introduced at the foundation of the Inquisition was maintained to the last by that terrible tribunal. "Our holy mother church," says Simancas, Bishop of Badajos, a writer of the sixteenth century, "can in no way endure the suspicion of heresy, but seeks by various

tene, Thesaur. T. V. p. 1801).—This is the same as the form prescribed by the Council of Tarragona in 1242, where we learn, moreover, that the number of compurgators was prescribed by the inquisitor in each case (Aguirre, Concil. Hispan. IV. 193).

[1] Conc. Lateran. IV. can. iii.—Decret. Gregor. P. P. IX. (Harduin. VII. 163).

[2] Hartzheim Conc. Germ. III. 542–50.—Alberic. Trium Font. ann. 1233–4.—Gest. Treviror. c. 175.

remedies to cure the suspect. Sometimes she forces them to abjure or to purge themselves; sometimes she elicits the truth by torture, and very often she coerces them with extraordinary punishments." Therefore, any one whose orthodoxy was doubtful, if he was unwilling to clear himself, at the command of the judge, was held to be convicted of heresy. By the secular law he had a year's grace before condemnation, but under the ecclesiastical law he was instantly punishable.[1]

Canonical purgation, according to the rules of the Inquisition, was indicated when public report rendered a man suspected and there was no tangible evidence against him. The number of compurgators was left to the discretion of the judge, who at the same time decided whether the deficiency of one, two, or more would amount to a condemnation. They were to be peers of the accused; and though he was allowed to select them, yet the qualification that they were to be good men and orthodox practically left their nomination to the officials—even as the customary accusation by the promotor-fiscal was held to be in itself the requisite amount of suspicion required as a condition precedent for the trial. The greater the suspicion, however, the larger was the number of compurgators to be adduced.

When the accused had chosen his men, and they were accepted by the judge, they were summoned, and each one examined separately by the Inquisitors as to his acquaintance with the defendant—a process by which, it may readily be conceived, the terrors of the Holy Office might easily be so used as to render them extremely unwilling to become his sponsors. They were then assembled together; the accused was brought in, the charge against him was read, and he took an oath denying it. Each conjurator was then taken separately and sworn as to his belief in the truth or falsity of the oath of denegation, and according as they expressed their conviction of the veracity of the accused the sentence was usually rendered, absolving or condemning him.

[1] Jacob. Simancæ de Cathol. Instit. Tit. lvi. No. 3, 4 (Romæ, 1575).

No process of administering compurgation can well be conceived more shrewdly adapted to reduce to a minimum the chances of acquittal, or to leave the result subject to the wishes of the officials. The testimony of the doctors of law, both civil and canon, accordingly was that it was blind, deceitful, and perilous.[1] In fact, it is easy to conceive of the difficulty of finding five, or nine, or eleven men willing to risk their lives and families by standing up in support of any one who had fallen into the grasp of the Holy Office. The terrible apprehension which the Inquisition spread abroad among all classes, and the dread which every man felt of being suspected and seized as an accomplice of heresy, are unconsciously intimated by Simancas when, arguing against this mode of trial, he observes that "the morals of mankind are so corrupt at the present day, and Christian charity has grown so cold, that it is almost impossible to find any one willing to join in clearing his neighbor, or who does not easily believe the worst of him and construe all doubtful things against him. When it is enough for the condemnation of the accused that the compurgators shall declare that they are ignorant or doubtful as to his innocence, who is there that will not express doubt when they know that he would not have been condemned to purge himself if he had not been violently suspected?" For these reasons he says that those of Moorish or Jewish stock should never be subjected to it, for it is almost impossible not to think ill of them, and, therefore, to send them to purgation is simply to send them to the stake.[2]

For all this, there was a lively discussion in the time of Simancas, whether if the accused succeeded in thus clearing himself, it was sufficient for acquittal. Many Inquisitors, indeed, held to the older practice that the accused should first be tortured, when if no confession could be forced from him

[1] Simancæ, loc. cit. No. 31.—Villadiego, Fuero Juzgo, p. 318 *b* (Madrid, 1600).—Both of these authorities stigmatize it as "fragilis et periculosa, cæca et fallax."

[2] Simancæ, loc. cit. No. 12.

he was put on his purgation; if he passed safely through this, he was then made to abjure the errors of which he had not been convicted, and after all this he was punished at the discretion of the judge.[1] Such an accumulation of injustice seems incredible, and yet Simancas feels himself obliged to enter into an elaborate discussion to prove its impropriety.

In countries where the Inquisition had not infected society and destroyed all feeling of sympathy between man and man this process of purgation was not impossible. Thus, in 1527, during one of the early persecutions of the reformers under Henry VIII., while numbers were convicted, two women, Margaret Cowbridge and Margery Bowgas, were allowed to clear themselves by compurgators, though there were several positive witnesses against them. It is also noteworthy that in these cases a portion of the compurgators were women.[2]

In the regular ecclesiastical courts the practice was maintained. When the Council of Constance, in its futile efforts at reformation, prepared an elaborate code of discipline, it proposed strenuous regulations to correct the all-pervading vice of simony. To prevent the sale of benefices this project of law decreed deprivation of all preferment as the punishment for such offences, and as transactions of the kind were commonly accomplished in secret, it ordained that common report should be sufficient for conviction; yet it nullified the regulation by permitting the accused to clear himself by canonical purgation.[3] Towards the close of the fifteenth century, Angelo da Chiavasco describes it as customary where there is no formal accuser and yet public rumor requires action, although the judge can also order it in cases of accusation: if the defendant fails of his purgation in the latter case he is to be punished as provided for his crime; if there is only rumor, then the

[1] Simancæ, loc. cit. No 17.

[2] Strype's Ecclesiastical Memorials, I. 87.

[3] Reformator. Constant. Decretal. Lib. v. Tit. ii. cap. 1, 3 (Von der Hardt, Tom. I. P. XII. pp. 739, 742).

penalty is discretional.[1] The judge determined the number of conjurators, who were all to be of good reputation and familiar with the life of the accused; if he were a monk, they ought if possible to be of the same order; they simply swore to their belief in his oath of denial.[2] A century later Lancelotti speaks of compurgation as the only mode of defence then in use in doubtful cases, where the evidence was insufficient.[3] This applied not only to cases between churchmen, but also to secular matters subject to ecclesiastical jurisdiction. Grillandus, writing about 1530, speaks of six conjurators of the kindred as the customary formula in proceedings for nullity of marriage, and mentions an instance personally known to him, wherein this procedure was successfully adopted by a wife desirous of a divorce from her husband who for three years had been rendered impotent by witchcraft, in accordance with the rules laid down in the canon law for such cases.[4] And among certain orders of monks within the last century, questions arising between themselves were settled by this mode of trial.[5]

In England, after the Anglican Church had received its final shape under Cranmer, during the reign of Edward VI., the custom appears in a carefully compiled body of ecclesiastical law, of which the formal adoption was only prevented accidentally by the untimely death of the young king. By this, a man accused of a charge resting on presumptions and incompletely proved, was required to clear himself with four compurgators of his own rank, who swore, as provided in the decretals of Innocent III., to their belief in his innocence.[6]

[1] Angeli de Clavasio Summa angelica, s. v. *Purgatio.*

[2] Baptistæ de Saulis Summa rosella, s. v. *Purgatio.*

[3] Institut. Jur. Canon. Lib. IV. Tit. ii. § 2.—Cf. Concil. Tarraconens. ann. 1591, Lib. IV. Tit. xiv. (Aguirre, VI. 322).

[4] P. Grillandi Tract. de Sortileg. Qu. 6, No. 14; Qu. 3, No. 36.—Decret. II. caus. xxx. q. 1, can. 2.—C. 7 Extra, Lib. IV. Tit. xv.

[5] Du Cange, loc. cit.

[6] Burnet, Reformation, Vol. II. p. 199 (Ed. 1681).

CHAPTER VIII.

ACCUSATORIAL CONJURATORS.

Though not strictly a portion of our subject, the question is not without interest as to the power or obligation of the plaintiff or accuser to fortify his case with conjurators. There is little evidence of such a custom in primitive times, but one or two allusions to it in the *Leges Barbarorum* show that it was occasionally practised. Some of the earlier texts of the Salic law contain a section providing that in certain cases the complainant shall sustain his action with a number of conjurators varying with the amount at stake; a larger number is required of the defendant in reply; and it is presumable that the judges weighed the probabilities on either side and rendered a decision accordingly.[1] As this is omitted in the later revisions of the law, it probably was not widely practised, or regarded as of much importance. Among the Baioarians, a claimant of an estate produced six conjurators who took the oath with him, and whose united efforts could be rebutted by the defendant with a single competent witness.[2] These directions are so precise that there can be no doubt that the custom prevailed to a limited extent among certain tribes, and a clause in the Decree of Childebert in 597, providing that the oaths of five or seven impartial men of good character shall convict a thief or malefactor, would seem evidently to refer to conjurators and not to witnesses.[3] In the treaty between Childebert and Clotair in 593, an accuser in case of theft is obliged to give twelve conjurators, half of them selected by himself, to

[1] Tit. LXXIV. of Herold's text; Cap. Extravagant. No. XVIII. of Pardessus.

[2] L. Baioar. Tit. XVI. cap. i. § 2.

[3] Pactus pro Tenore Pacis, § 2, cf. § 5 (Baluze).

swear that a theft has really taken place.[1] That it was, indeed, more generally employed than the scanty references to it in the codes would indicate, may be inferred from one of the ecclesiastical forgeries which Charlemagne was induced to adopt and promulgate. According to this, no accusation against a bishop could be successful unless supported by seventy-two witnesses, all of whom were to be men of good repute; forty-four were required to substantiate a charge against a priest, thirty-seven in the case of a deacon, and seven when a member of the inferior grades was implicated.[2] Though styled witnesses in the text, the number required is so large that they evidently could have been only conjurators, with whom the complainant supported his oath of accusation, and the fabrication of such a law would seem to show that the practice of employing such means of substantiating a charge was familiar to the minds of men.

Among the heathen Northmen, as we have seen, every pleader, whether plaintiff or defendant, was obliged to take a preliminary oath on the sacred *stalla hringr*, or altar ring, duly bathed in the blood of an ox sacrificed for the purpose. This custom was preserved in England, where the Anglo-Saxon laws required, except in trivial cases, a "fore-oath" from the accuser (*forath*, *antejuramentum*, *præjuramentum*), and William the Conqueror, in his compilation of the laws of Edward the Confessor, shows that this was sometimes strengthened by requiring the addition of conjurators, who were in no sense witnesses, since their oath had reference, not to the facts of the case, but solely to the purity of intention on the part of the accuser.[3] Indications of the same procedure are to be

[1] Decreti Childeberti c. vii. (Baluze). This provision was not merely temporary. It is preserved in the Capitularies (Lib. VII. c. 257), whence it was carried into the Decretum of Ivo of Chartres in the twelfth century (Decr. P. xiii. c. 6; P. xvi. c. 358).

[2] Capit. Car. Mag. VI. ann. 806, c. xxiii. (Concil. Roman. Silvestri PP. I.).

[3] E li apelur jurra sur lui par VII. humes numez, sei siste main, que pur haur nel fait ne pur auter chose, si pur sun dreit nun purchacer.—Ll. Guillel. I. cap. xiv.

found in the collection known as the laws of Henry I.[1] Probably to the development of this may be attributed the peculiar device of the *secta* already referred to (p. 84), consisting of those who supported the plaintiff by their oaths while in no sense absolute witnesses. They were not even examined unless the defendant demanded it. The bringing of the *secta* or suit remained a matter of form long after the actual production of the witnesses had become obsolete in the fourteenth century, and it was not finally abolished until 1852.[2]

In an age of comparative simplicity, it is natural that men should turn rather to the guarantees of individual character, or to the forms of venerable superstition, than to the subtleties of legal procedure. Even as the defendant was expected to produce vouchers of his truthfulness, so might the plaintiff be equally required to give evidence that his repute among his neighbors was such as to justify the belief that he would not bring a false charge or advance an unfounded claim. The two customs appear to arise from the same process of reasoning and to be identical in spirit, leading to a contest between the two parties as to which could bring forward the largest and most credible number of conjurators, and the position of the accused being outsworn was a recognized circumstance in jurisprudence. Thus, the Council of Tribur in 895 provides that in such case he must either confess or undergo the ordeal.[3] In process of time accusatorial conjurators became commonly used in many places. In Béarn the laws of the thirteenth century provide that in cases of debt under forty sous, where there was no testimony on either side, the claimant could substantiate his case by bringing forward one conjurator, while the defendant could rebut it with two.[4] A similar rule obtained in

[1] Omnis tihla tractetur antejuramento plano vel observato.—Ll. Henrici I. Tit. lxiv. § 1. Antejuramentum a compellante habeatur, et alter se sexto decime sue purgetur; sicut accusator precesserit.—Ibid. Tit. lxvi. § 8.

[2] Prof. J. B. Thayer in Harvard Law Review, Vol. V. pp. 47–51.

[3] C. Tribur. ann. 895 c. xxii.

[4] For de Morlaas, Rubr. xxxviii. art. 63.

England in all actions arising from contracts and sales;[1] and in the laws of Soest in Westphalia, compiled at the end of the eleventh or the commencement of the twelfth century, an accusation of homicide could be proved by six conjurators swearing with the prosecutor, while if this failed the accused could then clear himself with eleven compurgators.[2] Throughout Germany, in the thirteenth century, we find the principle of accusing conjurators generally received, as is evident from the *juramentum supermortuum* already referred to, and other provisions of the municipal law.[3] So thoroughly, indeed, was this established that, in some places, in prosecutions for highway robbery, arson, and other crimes, the accuser had a right to require every individual in court, from the judge to the spectator, to help him with an oath or to swear that he knew nothing of the matter, and even the attorney for the defendant was obliged to undergo the ceremony.[4] In Sweden it was likewise in use under the name of *jeffniteed*;[5] and in the compilation of the laws by Andreas, Archbishop of Lunden, in the thirteenth century, there is a curious provision for cases of secret murder by which the accuser could force nine men successively to undergo the hot-iron ordeal, after which, if thus far unsuccessful, he could still force a tenth man to trial on producing twelve conjurators to swear to the guilt of the accused—these conjurators, in case of acquittal, being each liable to a fine of three marks to the accused and as much to the church.[6] In Norway and Iceland, in certain cases of imputed crime, the accuser was bound to produce ten companions, of whom eight

[1] Bracton. Lib. IV. Tract. vi. cap. 18, § 6.

[2] Statuta Susatensia, No. 10 (Hæberlin, Analecta Medii Ævi, p. 509).—The same provision is preserved in a later recension of the laws of Soest, dating apparently from the middle of the thirteenth century (Op. cit. p. 520).

[3] Jur. Provin. Alaman. cap. cccix. § 4 (Ed. Schilter).—Jur. Provin. Saxon. Lib. III. art. 88.—Sachsische Weichb. art. 115.

[4] Jur. Provin. Alaman. cap. cccxcviii. §§ 19, 20.

[5] Du Cange *sub voce*.

[6] Legg. Scan. Provin. Lib. V. c. 57 (Ed. Thorsen, p. 140).

appeared simply as supporters, while two swore that they had heard the offence spoken of, but that they knew nothing about it of their own knowledge—the amount of weight attached to which asseveration is shown by the fact that the accused required only two conjurators to clear himself.[1]

Perhaps the most careful valuation of the oath of a plaintiff is to be found in the Coutumier of Bordeaux, which provides that, in civil cases not exceeding four sols in amount, the claimant should substantiate his case by an oath on the Gospels in the Mayor's Court; when from four to twenty sols were at stake, he was sworn on the altar of St. Projet or St. Antoine; from twenty sols to fifteen livres, the oath was taken in the cemetery of St. Seurin, while for amounts above that sum it was administered on the "Fort" or altar of St. Seurin himself. Persons whose want of veracity was notorious were obliged in all cases, however unimportant, to swear on the Fort, and had moreover to provide a conjurator who with an oath of equal solemnity asserted his belief in the truth of his companion.[2]

The custom of supporting an accusatorial oath by conjurators was maintained in some portions of Europe to a comparatively recent period. Wachter[3] prints a curious account of a trial, occurring in a Suabian court in 1505, which illustrates this, as well as the weight which was still attached to the oath of a defendant. A woman accused three men on suspicion of being concerned in the murder of her husband. They denied the charge, but when the oath of negation was tendered to them, with the assurance that, if they were Suabians, it would acquit them, they demanded time for consideration. Then the advocate of the widow stepped forward to offer the oath of accusation, and two conjurators being found willing to support him the accused were condemned without further

[1] Ideo manus libro imponimus sacro, quod audivimus (crimen rumore sparsum), at nobis ignotum est verum sit nec ne.—Jarnsida, Mannhelge, cap. xxiv.

[2] Rabanis, Revue Hist. de Droit, 1861, p. 511.

[3] Du Boys, Droit Criminel des Peuples Modernes, II. 595.

examination on either side. A similar process was observed in the Vehmgericht, or Court of the Free Judges of Westphalia, whose jurisdiction in the fourteenth and fifteenth centuries became extended over the whole of Germany. Accusations were supported by conjurators, and when the defendant was a Frei-graff, or presiding officer of a tribunal, the complainant was obliged to procure seven Frei-schöppen, or free judges, to take the accusatorial oath with him.[1]

The latest indication that I have met with of established legal provisions of this nature occurs in the custom of Britanny, as revised in 1539. By this, a man claiming compensation for property taken away is to be believed on oath as to his statement of its value, provided he can procure companions worthy of credence to depose "qu'ils croyent que le jureur ait fait bon et loyal serment."[2] Even this last vestige disappears in the revision of the Coutumier made by order of Henry III. in 1580.

[1] Freher. de Secret. Judic. cap. xvii. § 26.

[2] Anc. Cout. de Bretagne, Tit. VIII. art. 168.

II.

THE WAGER OF BATTLE.

CHAPTER I.

When man is emerging from barbarism, the struggle between the rising power of reason and the waning supremacy of brute force is full of instruction. Wise in our generation, we laugh at the inconsistencies of our forefathers, which, rightly considered as portions of the great cycle of human progress, are rather to be respected as trophies of the silent victory, won by almost imperceptible gradations. When, therefore, in the dark ages, we find the administration of justice so strangely interrupted by appeals to the sword or to chance, dignified under the forms of Christianized superstition, we should remember that even this is an improvement on the all-pervading first law of violence. We should not wonder that barbarous tribes require to be enticed to the acknowledgment of abstract right through pathways which, though devious, may reach the goal at last. When the strong man is brought, by whatever means, to yield to the weak, a great conquest is gained over human nature; and if the aid of superstition is invoked to decide the struggle, it is idle for us, while enjoying the result, to contemn the means which the weakness of human nature has rendered necessary to the end. With uneducated nations, as with uneducated men, sentiment is stronger than reason, and sacrifices will be made for the one which are refused to the other. If, therefore, the fierce warrior, resolute to maintain an injustice or a usurpation, can be brought to submit his claim to the chances of an equal com-

bat or of an ordeal, he has already taken a vast step towards acknowledging the supremacy of right and abandoning the personal independence which is incompatible with the relations of human society. It is by such indirect means that individuals, each relying on his own right hand, have been gradually led to endure regular forms of government, and to cherish the abstract idea of justice as indispensable between man and man. Viewed in this light, the ancient forms of procedure lose their ludicrous aspect, and we contemplate their whimsical admixture of force, faith, and reason, as we might the first rude engine of Watt, or the "Clermont," which painfully labored in the waters of the Hudson—clumsy and rough it is true, yet venerable as the origin and prognostic of future triumphs.

There is a natural tendency in the human mind to cast the burden of its doubts upon a higher power, and to relieve itself from the effort of decision by seeking in the unknown the solution of its difficulties. Between the fetish worshippers of Congo and the polished sceptics who frequented the *salon* of Mlle. le Normant, the distance, though great, is bridged over by this common weakness; and whether the information sought be of the past or of the future, the impulse is the same. When, therefore, in the primitive *mallum*, the wisdom of the *rachinborgs* was at fault, and the absence or equal balance of testimony rendered a verdict difficult, what was more natural than to appeal for a decision to the powers above, and to leave the matter to the judgment of God?[1] Nor, with the warlike instincts of the race, is it

[1] Thus, as late as the thirteenth century, the municipal law of Southern Germany, in prescribing the duel for cases destitute of testimony, says with a naïve impiety: "Hoc ideo statutum est, quod causa hæc nemini cognita est quam Deo, cujus est eandem juste decidere." Early in the sixteenth century the pious Aventinus regretfully looks back upon the time when princes and priests, assembled to witness the combat, "divinam opem implorabant, beneficia memoriter commemorabant quæ in simili negotio

surprising that this appeal should be made to the God of battles, to whom, whether they addressed him as Odin or Sabaoth, they looked in every case for a special interposition in favor of innocence. The curious mingling of procedure, in these untutored seekings after justice, is well illustrated in a form of process prescribed by the primitive Bavarian law. A man comes into court with six conjurators to claim an estate; the possessor defends his right with a single witness, who must be a landholder of the vicinage. The claimant then attacks the veracity of the witness—"Thou hast lied against me. Grant me the single combat, and let God make manifest whether thou hast sworn truth or falsehood;"[1] and, according to the event of the duel is the decision as to the truthfulness of the witness and the ownership of the property.

In discussing the judicial combat, it is important to keep in view the wide distinction between the wager of battle as a judicial institution, and the custom of duelling which has obtained with more or less regularity among all races and at all ages.

Deus immortalis Christus servator noster ipsis pro sua benignitate atque clementia contulisset . . . . comprecabantur ut summa potestas in re præsenti, pollicita re, hactenus semper factitasset, comprobaret" (Aventini Annal. Baior. Lib. IV. cap. xiv. n. 28). Even as late as 1617, August Viescher, in an elaborate treatise on the judicial duel, expressed the same reliance on the divine interposition: "Dei enim hoc judicium dicitur, soli Deo causa terminanda committitur, Deo igitur authore singulare hoc certamen suscipiendum, ut justo judicio adjutor sit, omnisque spes ad solam summæ providentiam Trinitatis referenda est" (Vischer Tract. Juris Duellici Universi, p. 109). This work is a most curious anachronism. Viescher was a learned jurisconsult who endeavored to revive the judicial duel in the seventeenth century by writing a treatise of 700 pages on its principles and practice. He exhibits the wide range of his studies by citations from no less than six hundred and seventy-one authors, and manages to convey an incredibly small amount of information on the subject. Ephraim Gerhardt, moreover, taxes him with wholesale plagiarism from Michael Beuther's *Disputatio de duello* (Strassburg, 1609) and with false citations of authorities.—Eph. Gerhardi Tract. de Judicio Duellico, præfat.

[1] L. Baioar. Tit. XIV. c. i. § 2.

When the Horatii met the Curiatii, or when Antony challenged Octavius to decide the empire of the world with their two swords, or when Edward III. in 1340 proposed to Philippe de Valois to settle their rival claims to the heritage of France army to army, a hundred to a hundred, or body to body,[1] or when the ancient Hindus were in the habit of averting the carnage of battles in the same manner[2]—these were simply expedients to save the unnecessary effusion of blood, or to gratify individual hate. When the *raffiné* of the times of Henri Quatre, or the modern fire-eater, has wiped out some imaginary stain in the blood of his antagonist, the duel thus fought, though bearing a somewhat closer analogy to the judicial combat, is not derived from it, but from the right of private vengeance which was common to all the barbarian tribes, and from the cognate right of private warfare which was the exclusive privilege of the gentry during the feudal period.[3] The established euphuistic formula of demanding "the satisfaction of a gentleman," thus designates both the object of the custom and its origin. The abolition of private wars gave a stimulus to the duel at nearly the period when the judicial combat fell gradually into desuetude. The one thus succeeded to the other, and, being kindred in form, it is not surprising that for a time there was some confusion in the minds of men respecting their distinctive characteristics. Yet it is not difficult to draw the line between them. The object of the one was vengeance and reparation; the theory of the other was the discovery of truth and the impartial ministration of justice.

It is easy to multiply examples illustrating this. John van Arckel, a knight of Holland, followed Godfrey of Bouillon to the first crusade. When some German forces joined the army,

[1] Rymer, Fœdera, V. 198–200. [2] Ayeen Akbery, II. 324.

[3] The early edicts directed against the duel proper (Ordonn. Charles IX., an. 1566; Henri IV., an. 1602—in Fontanon I. 665) refer exclusively to the noblesse, and to those entitled to bear arms, as addicted to the practice, while the judicial combat, as we shall see, was open to all ranks, and was enforced indiscriminately upon all.

a Tyrolese noble, seeing van Arckel's arms displayed before his tent, and recognizing them as identical with his own, ordered them torn down. The insult was flagrant, but the injured knight sought no immediate satisfaction for his honor. He laid the case before the chiefs of the crusade as a judicial matter; an examination was made, and both parties proved their ancestral right to the same bearings. To decide the conflicting and incompatible pretensions, the judges ordered the judicial combat, in which van Arckel deprived his antagonist of life and quarterings together, and vindicated his claim to the argent 2 bars gules, which in gratitude to Heaven he bore for eight long years in Palestine. This was not a quarrel on a punctilio, nor a mode of obtaining redress for an insult, but an examination into a legal question which admitted of no other solution according to the manners of the age.[1] When, after the Sicilian Vespers, the wily Charles of Anjou was sorely pressed by his victorious rival Pedro III. of Aragon, and desired to gain time in order to repress a threatened insurrection among his peninsular subjects, he sent a herald to Don Pedro to accuse him of bad faith in having commenced the war without defiance. The fiery Catalan fell into the snare, and in order to clear himself of the charge, which was not ill-founded, he offered to meet his accuser in combat and determine their rights to the Sicilian throne. The terms were laboriously settled by six representatives of each king and were signed by the principals December 26, 1282; they were to meet, with a hundred knights on each side, June 1, 1283, in the neutral territory of Bordeaux and fight it out in the presence of Edward I. of England or of his deputy, and each swore that if he failed to be present he would forever hold himself as false and perjured and deprived of the royal station and dignity. When Charles applied to his cousin Edward to grant the *champ-clos*

[1] Chron. Domin. de Arkel (Matthæi Analect. VIII. 296). In 1336 a judicial duel was fought in Bavaria to decide a similar question—the right of two nobles to a coat of arms.—Würdinger, Beiträge zur Geschichte des Kampfrechtes in Bayern, München, 1877, p. 14.

the latter emphatically replied that for the crowns of the Two Sicilies he would not be judge in such a combat; Martin II. chimed in with a bull forbidding him to serve, and the combat never took place, Charles of Anjou having obtained his purpose in the intervening suspension of arms.[1] Nothing more picturesquely romantic is to be found in the annals of chivalry than Muntaner's relation of Don Pedro's secret ride to Bordeaux and his appearance on the day appointed in the lists where Edward's seneschal was unable to guarantee him a fair field.[2] So the challenge which Richard II., in 1383, sent to Charles VI. wore the aspect of the judicial duel to decide their claims to the realms of France under the judgment of God.[3] Though practically these challenges may differ little from that of Antony, still their form and purport were those of the judicial duel in civil or criminal cases. So, when Charles V. offered to maintain in single combat the charge that Francis I. had villainously forfeited his faith in disregarding the treaty of Madrid, and Francis hotly replied with a demand for a secure field in which to defend his honor, the challenge and its acceptance wore the form of the judicial duel to decide the question of guilt; although Charles in appointing the Bidasoa as the place of meeting gave as his reasons the avoidance of bloodshed and the ending of the war as well as the maintenance of his just cause.[4] The celebrated duel, fought in 1547, between Jarnac and La Chastaigneraye, so piteously deplored by honest old Brantôme, shows the distinction maintained to the last. It was conducted with all judicial ceremonies, in

[1] Rymer, Fœdera, II. 226–9, 230–4, 239–40, 242–3.—Lünig. Cod. Ital. Diplom. II. 986.

[2] Ramon Muntaner, cap. lxxi. See also Pedro's own brief account of the matter in a letter of June 20, 1283, to his nephew, the Infante Juan of Castile.—Memorial Histórico Español, 1851, T. II. p. 99.

[3] "Sub speculatoris supremi judicio terminatum."—Rymer, Fœd. VII. 407.

[4] Du Bellay, Mémoires, Liv. III.—The letters are given by Juan de Valdés in the *Diálogo de Mercurio i Caron* (Dos Diálogos, pp. 243, 247, 287.—Reformistas antiguos Españoles).

presence of Henry II., not to settle a point of honor, but to justify Jarnac from a disgusting accusation brought by his adversary. Resulting most unexpectedly in the death of La Chastaigneraye, who was a favorite of the king, the monarch was induced to put an end to all legalized combats, though the illegal practice of the private duel not only continued to flourish, but increased beyond all precedent during the succeeding half century—Henry IV. having granted in twenty-two years no less than seven thousand letters of pardon for duels fought in contravention of the royal edicts. Such a mode of obtaining "satisfaction" is so repugnant to the spirit of our age that it is perhaps not to be wondered at if its advocates should endeavor to affiliate it upon the ancient wager of battle. Both relics of barbarism, it is true, are developments from the same primitive habits and customs, yet they are essentially distinct and have coexisted as separate institutions; and, however much occasionally intermingled by the passions of periods of violence, they were practised for different ends, and were conducted with different forms of procedure. We have only to deal with the combat as a strictly judicial process, and shall, therefore, leave untouched the vast harvest of curious anecdote afforded by the monomachial propensities of modern times.

CHAPTER II.

ORIGIN OF THE JUDICIAL DUEL.

The mediæval panegyrists of the wager of battle sought to strengthen its title to respect by affirming that it was as old as the human race, and that Cain and Abel, unable to settle their conflicting claims in any other mode, agreed to leave the decision to the chances of the duel; while the combat between David and Goliath was considered by the early schoolmen as an unanswerable proof of the favor with which God regarded such encounters. Leaving such speculations aside, it is enough

for us to know that all the tribes which settled in Europe practised the combat with so general a unanimity that its origin must be sought at a period anterior to their separation from the common stock, although it has left no definite traces in the written records which have reached us of the Asiatic Aryans.[1]

That some vague notions of Divine justice making itself manifest through the sword must have existed in prehistoric Hellenic times is apparent from Homer's elaborate description of the duel between Menelaus and Paris. This has all the characteristics of a judicial combat to decide the guilt or innocence of the claimants for the possession of the fair Helen. A preliminary sacrifice is offered to Zeus; Hector and Ulysses measure out the ground; lots are cast to decide which of the antagonists shall have the first throw of the spear; and the assembled armies put up a prayer to Zeus, entreating him to send to Hades the guilty one of the two combatants.[2] This is not merely a device to put an end to the slaughter of brave warriors—it is an appeal to Heaven to elicit justice by means of arms.

The Italiote branch of the Aryans affords us a more definite illustration of the same belief in the custom of the Umbrians, who settled quarrels by single combat, and deemed that he who slew his adversary thus proved that his cause was just.[3]

Although Cæsar makes no mention of such a custom in Gaul, it evidently prevailed among the Celtic tribes. Livy describes how some Spaniards seized the opportunity of a show of gladiators, given by Scipio, to settle various civil suits by combat, and he proceeds to particularize a case in which two

[1] An outlying fragment of the same belief is to be seen in the ancient Japanese practice of deciding knotty questions by the judicial duel (Griffis's Mikado's Empire, New York, 1876, p. 92). Even the most savage of existing races, the aborigines of Australia, have a kind of duel under certain rules by which private controversies are settled, and among the Melanesians the custom prevails, champions even being sometimes employed (Patetta, Le Ordalie, Torino, 1890, pp. 55, 60).

[2] Iliad. III. 277–323.

[3] Nicholaus Damascenus (Didot Frag. Hist. Græcor. III. 457).

rival cousins decided in this manner a disputed question in the law of descent, despite the earnest remonstrances of the Roman commander.[1] Among the Irish Celts, at their appearance in history, we find the judicial duel established with fixed regulations. In the Senchus Mor, a code claiming to be compiled under the supervision of St. Patrick, the delay of five days in a distress is explained by the history of a combat between two long previous in Magh-inis. "When they had all things ready for plying their arms, except a witness alone, they met a woman at the place of combat, and she requested of them a delay, saying, 'If it were my husband that were there I would compel you to delay.' 'I would delay,' said one of them, 'but it would be prejudicial to the man who sues me; it is his cause that would be delayed.' 'I will delay,' said the other. The combat was then put off, but they did not know till when it was put off, until Conchubhur and Sencha passed judgment respecting it; and Sencha asked, 'What is the name of this woman?' 'Cuicthi,' (five) said she, 'is my name.' 'Let the combat be delayed,' said Sencha, 'in the name of this woman for five days.'"[2] The combative ardor of the Feini, indeed, was so strong, and the appeal to the wager of battle so general, that on their conversion to Christianity they found it difficult to understand that the holy ministers of Christ should be restricted from vindicating their rights by arms, and St. Patrick, in a synod held in 456, was obliged to threaten his clergy with expulsion from the church if they endeavored to escape by appeal to the sword from settling obligations which they had incurred by giving security for heathens.[3]

This prevalence of the wager of battle among the Irish Celts renders probable its existence likewise among the early inhabitants of Britain. If so, the long domination of the Romans was doubtless sufficient to extinguish all traces of it. The

[1] Liv. XXVII. 21.

[2] Senchus Mor, I. 251.

[3] Synod. S. Patricii ann. 456, c. 8.

Welsh laws attributed to Hoel Dda in the early part of the tenth century, which are exceedingly minute and precise in their directions as to all forms of legal procedure, make no allusion to it whatever. It is true that an ancient collection of laws asserts that the code of Dyvnwal-moel-mud, a British king, prescribed the ordeals of battle, of hot iron, and of boiling water, and that Hoel in his legislation considered them unjust, abrogated them, and substituted the proof by men, or *raith*.[1] This legend, however, is very apocryphal. There is no allusion to such customs in the Welsh codes up to the close of the twelfth century, and the few indications which occur in subsequent collections would seem to indicate that these were rather innovations due to the influence of the English conquest than revivals of ancient institutions.

Among the Slavs, as they emerge into history, the duel occupies a controlling position in the administration of justice. Ibn Dost, an Arab traveller in Russia in the tenth century, relates that a pleader dissatisfied with the judgment of the king could always appeal to the sword, and this decision was regarded as so absolute that the defeated party, his family and possessions were all at the disposition of the victor. In Bohemia at a later period the successful combatant was required to decapitate his antagonist.[2] The earliest records of the various other Slavic lands give evidence of the prevalence of the judicial combat, showing that it formed part of their ancestral customs prior to their occupation of their present territories.[3]

Among the Norræna branch of the Teutons the wager of battle can be traced back to the realm of legend and tradition. Saxo Grammaticus informs us that about the Christian era Frotho III., or the Great, of Denmark, ordered the employment of the duel to settle all controversies, preferring that

[1] Anomalous Laws, Book XIV. chap. xiii. § 4 (Owen II. 623).

[2] Patetta, Le Ordalie, p. 156.

[3] Königswarter, op. cit. p. 224; Patetta, pp. 158 sqq.; Eph. Gerhardi Tract. Jurid. de Judic. Duellico, c. ii. § 12.

his warriors should accustom themselves to rely, not on eloquence, but on courage and skill;[1] and however doubtful the chronology may be, the tradition shows that the origin of the custom was lost in the depths of antiquity. Among the heathen Norsemen, indeed, the *holm-gang*, or single combat, was so universal an arbiter that it was recognized as conferring a right where none pre-existed. Any athlete, who confided in his strength and dexterity with his weapons, could acquire property by simply challenging its owner to surrender his land or fight for it. When Iceland, for instance, was in process of settlement, Kraku Hreidar sailed thither, and on sighting land invoked Thor to assign to him a tract of ground which he would forthwith acquire by duel. He was shipwrecked on reaching the shore, and was hospitably received by a compatriot named Havard, with whom he passed the winter. In the spring he declared his purpose of challenging Sæmund Sudureyska for a sufficient holding, but Havard dissuaded him, arguing that this mode of acquiring property rarely prospered in the end, and Eirek of Goddolom succeeded in quieting him by giving him land enough. Others of these hardy sea-rovers were not so amenable to reason as Kraku. When Hallkell came to Iceland and passed the winter with his brother Ketelbiorn, the latter offered him land on which to settle, but Hallkell disdained so peaceful a proposition, and preferred to summon a neighbor named Grim to surrender his property or meet him in the *holm-gang*. Grim accepted the defiance, was slain, and Hallkell was duly installed as his heir. A variation of the custom is illustrated by the case of Hrolleif, who after some years' settlement grew dissatisfied with his holding, and challenged his neighbor Eyvind to an exchange of properties or a combat, alternatives of which the peace-loving Eyvind accepted the former.[2] The Saga of Egil Skallagrimsson speaks of a noted duellist known as Ljot the Pale, who had come to the

[1] Saxon. Grammat. Hist. Dan. Lib. v.

Islands Landnamabok, III. vii.; v. xii. xiii. See also II. vi. and xiii.

district a landless stranger, and had grown wealthy by thus challenging proprietors and taking their lands, but who met his fate at the hands of Egil, who, while travelling, came to the place where Ljot was about to engage in a holm-gang with a weaker antagonist. Egil volunteered to take his place, and promptly slew Ljot. The holm-gang was so named because the battle was usually fought on a small island or holm; and that it was regarded as an appeal to the gods is manifested by the custom of the victor sacrificing an ox as soon as he left the spot.[1]

It is true that Tacitus makes no allusion to such a custom among the Germans of his time, a passage which is frequently quoted to that effect being in reality only a description of a mode of divination in which, at the beginning of a war, one of the enemy was captured and made to fight with a chosen champion, the result of the combat being taken to foreshadow the event of the contest.[2] The object of Tacitus, however, was not to excite the curiosity of his countrymen, but rather to contrast their vices with the uncivilized virtues of the Germans, and his silence on this point is not a negative evidence of weight in comparison with the positive proofs which exist with regard to kindred tribes. Be this as it may, as soon as we obtain an insight into their customs from written laws, we find the wager of battle everywhere recognized. The earliest of these is the code of the Burgundians, collected by King Gundobald towards the close of the fifth century, and in this the duel occupies a place so conspicuous that it obtained in time the name of Lex Gundebalda or Loy Gombette, giving rise to a belief that it was of Burgundian origin.

In the ordinary texts of the Salic law no mention is made of it, but in one manuscript it is alluded to as a regular form

[1] Keyser's Religion of the Northmen, Pennock's Translation, p. 245–7.

[2] Tacit. de Mor. Germ. x. Du Cange refers to a passage of Paterculus as proving the existence of the judicial duel among the Germans (Lib. II. cap. 118), but it seems to me only to refer to the law of the strongest.

of procedure.[1] This silence, however, does not justify the conclusion that the battle ordeal was not practised among the Franks. Enough instances of it are to be found in their early history to show that it was by no means uncommon;[2] and, at a later period, the same absence of reference to it is observable in the Lex Emendata of Charlemagne, though the capitularies of that monarch frequently allude to it as a legal process in general use. The off-shoots of the Salic law, the Ripuarian, Allemannic, and Bavarian codes—which were compiled by Thierry, the son of Clovis, revised successively by Childebert and Clotair II., and put into final shape by Dagobert I. about the year 630—in their frequent reference to the "campus," show how thoroughly it pervaded the entire system of Germanic jurisprudence. The Lombards were, if possible, even more addicted to its use. Their earliest laws, compiled by King Rotharis in 643, seventy-six years after their occupation of Italy, make constant allusion to it, and their readiness to refer to its decision the most conspicuous cases is shown in the story of Queen Gundeberga, the wife of Ariovaldus, who was the immediate predecessor of Rotharis. Adalulf, a disappointed lover, brought against her a charge of conspiracy which induced Ariovaldus to cast her in prison, where she lay for three years, until Clotair the Great, to whom she was of kindred, sent an embassy to obtain her release. Diplomacy was of no avail, and all that the Frankish envoys could accomplish was to secure for her a trial by single combat, in which a champion named Pitto overcame Adalulf the accuser, and Gundeberga was restored to the throne with her innocence recognized.[3] Indeed, the tenacious hold which it maintained on the veneration of the Lombards is seen in the fruitless efforts to restrict its employment and to abrogate it

[1] Si tamen non potuerit adprobare . . . . et postea, si ausus fuerit, pugnet.—Leyden MS.—Capit. Extravagant. No. xxviii. of Pardessus.

[2] Gregor. Turon. Hist. Franc. Lib. VII. c. xiv.; Lib. X. c. x.—Aimoini Lib. IV. c. ii.

[3] Aimoini Lib. IV. cap. X.

by Rotharis and his successors under the civilizing influence of contact with Roman institutions. Thus Rotharis forbids its use in some cases of importance, substituting conjurators, with a marked expression of disbelief, which shows how little confidence was felt in its results by enlightened men.[1] The next lawgiver, King Grimoald, decreed that thirty years' possession of either land or liberty relieved a defendant from maintaining his title by battle, the privilege of employing conjurators being then conceded to him.[2] In the succeeding century, King Liutprand sought to abolish it entirely, but finding the prejudices of his people too strong to be overcome, he placed on record in the statute-book a declaration of his contempt for it and a statement of his efforts to do away with it, while he was obliged to content himself with limiting the extent of its application, and diminishing the penalties incurred by the defeated party.[3]

While the laws of the Angles, the Saxons, and the Frisians bear ample testimony to the general use of the wager of battle,[4] it is not a little singular that the duel appears to have been unknown among the Anglo-Saxons. Employed so extensively as legal evidence throughout their ancestral regions, by the kindred tribes from which they sprang, and by the Danes and Norwegians who became incorporated with them; harmonizing, moreover, with their general habits and principles

[1] Quia absurdum et impossible videtur esse ut tam grandis causa sub uno scuto per pugnam dirimatur.—L. Longobard. Lib. II. Tit. lv. §§ 1, 2, 3.

[2] L. Longobard. Lib. II. Tit. xxxv. §§ 4, 5.

[3] Gravis causa nobis esse comparuit, ut sub uno scuto, per unam pugnam, omnem suam substantiam homo amittat. . . . . Quia incerti sumus de judicio Dei, et multos audivimus per pugnam sine justitia causam suam perdere. Sed propter consuetudinem gentis nostræ Longobardorum legem impiam vetare non possumus (L. Longobard. Lib. I. Tit. ix. § 23). Muratori states that the older MSS. read "legem istam," in place of "impiam," as given in the printed texts, which would somewhat weaken the force of Liutprand's condemnation.

[4] L. Anglior. et Werinor. Tit. I. cap. 3; Tit. XV.—L. Saxon. Tit. XV.—L. Frision. Tit. V. c. i.; Tit. XI. c. 3.

of action, it would seem impossible that they should not likewise have practised it. I can offer no explanation of the anomaly, and can only state the bare fact that the judicial combat is not referred to in any of the Anglo-Saxon or Anglo-Danish codes.[1] There seems, indeed, to be no reason to doubt that its introduction into English jurisprudence dates only from the time of William the Conqueror.[2]

The Goths, while yet untainted by the influence of Rome, were no less given to the employment of the judicial duel than their Teutonic kindred, and Theodoric vainly endeavored to suppress the custom among those of his subjects

[1] In Horne's Myrror of Justice (cap. II. sect. 13), a work which is supposed to date from the reign of Edward II., there is a form of appeal of treachery "qui fuit trové en vielx rosles del temps du Roy Alfred," in which the appellant offers to prove the truth of his charge with his body; but no confidence can be placed in the accuracy of the old lawyer. Some antiquarians have been inclined to assume that the duel was practised among the Anglo-Saxons, but the statement in the text is confirmed by the authority of Mr. Pike (Hist. of Crime in England, I. 448), whose exhaustive researches into the original sources of English jurisprudence render his decision virtually final.

In the Saga of Olaf Tryggvesson it is related that he was chosen by an English queen named Gyda for her husband, to the great displeasure of Alfin a previous pretender to her hand, who challenged him thereupon, because "It was then the custom in England, if two strove for anything, to settle the matter by single combat" (Laing's Heimskringla, I. 400). Snorro Sturleson, however, can hardly be regarded as of much authority on a point like this; and as Gyda is represented as daughter of a king of Dublin, the incident, if it occurred at all, may have taken place in Ireland.

[2] A charter issued by William, which appears to date early in his reign, gives the widest latitude to the duel both for his French and Saxon subjects (L. Guillelmi Conquest. II. §§ 1, 2, 3. Thorpe, I. 488). Another law, however, enabled a Norman defendant to decline the combat when a Saxon was appellant. "Si Francigena appellaverit Anglum. . . . . Anglus se defendat per quod melius voluerit, aut judicio ferri, aut duello. . . . . Si autem Anglus Francigenam appellaverit et probare voluerit, judicio aut duello, volo tunc Francigenam purgare se sacramento non fracto" (Ibid. III. § 12. Thorpe, I. 493). Such immunity seems a singular privilege for the generous Norman blood.

who had remained in Pannonia.[1] That no trace of it is to be found among the extant laws of both Ostrogoths and Wisigoths, framed subsequently to their settlement in Italy, France, and Spain, is easily explained. The effect upon the invaders of the decaying but still majestic civilization of Rome, the Byzantine education of Theodoric, the leader of the Ostrogoths, and his settled policy of conciliating the Italians by maintaining as far as possible the existing state of society, preclude any surprise that no allusion to the practice should occur in the short but sensible code known as the "Edict of Theodoric," which shows how earnestly that enlightened conqueror endeavored to fuse the invaders and the vanquished into one body politic.[2] With regard to the Wisigoths, we must remember that early conversion to Christianity and long intercourse with civilization had already worn off much of the primitive ferocity of a race which could produce in the fourth century such a man as Ulphilas. They were the earliest of the invaders who succeeded in forming a permanent occupation of the conquered territories; and settling, as they did, in Narbonensian Gaul and Spain while the moral influence of Rome was yet all powerful, the imperial institutions exercised a much greater effect upon them than on the subsequent bands of Northern barbarians. Accordingly, we find their codes based almost entirely upon the Roman jurisprudence, with such modifications as were essential to adapt it to a ruder state of society. Their nicely balanced provisions and careful distinctions offer a striking contrast to the shapeless legislation of the races that followed, and neither the judicial combat nor canonical compurgation found a place in them. Even the vulgar ordeal would appear to have been

[1] Cassiodor. Variar. Lib. III. Epist. xxiii., xxiv.

[2] An Epistle from Theodoric to the Gaulish provinces, which he had just added to his empire, congratulates them on their return to Roman laws and usages, which he orders them to adopt without delay. Its whole tenor shows his thorough appreciation of the superiority of the Imperial codes to the customs of the barbarians, and his anxiety for settled principles of jurisprudence (Cassiodor. Variar. Lib. III. Epist. xvii.).

unknown until a period long subsequent to the conquest of Aquitaine by Clovis, and but little anterior to the overthrow of the Gothic kingdom of Spain by the Saracens. But even as in Italy the Lombard domination destroyed the results of Theodoric's labors, so in France the introduction of the Frankish element revived the barbarian instincts, and in the celebrated combat before Louis le Débonnaire, between Counts Bera and Sanila, who were both Goths, we find the "pugna duorum" claimed as an ancient privilege of the race, with the distinction of its being equestrian, in accordance with Gothic usages, and so thoroughly was the guilt of Bera considered to be proved by his defeat, that his name became adopted in the Catalan dialect as a synonym of traitor.[1]

CHAPTER III.

UNIVERSAL USE OF THE JUDICIAL COMBAT.

The wager of battle thus formed part of the ancestral institutions of all the races who founded the nations of Europe. With their conversion to Christianity the appeal was transferred from the heathen deities to God, who was expected to intervene and decide the battle in favor of the right.[2] It was an appeal to the highest court and popular confidence in the arbitrament of the sword was rather strengthened than diminished. Enlightened law-givers not only shared, to a greater or less extent, in this confidence, but were also disposed to regard the

[1] Ermold. Nigell. de Reb. Gest. Ludov. Pii Lib. III.—Astron. Vit. Ludov. Pii cap. xxxiii.—Marca Hispanica, Lib. III. c. 21.

[2] Even as late as the middle of the thirteenth century St. Ramon de Peñafort thus defines it—"Duellum est singularis pugna inter aliquos ad probationem veritatis, ita videlicet ut qui vicerit probasse intelligitur; et dicitur duellum quasi duorum bellum. Dicitur etiam vulgo in pluribus partibus judicium, eo quod ibi Dei judicium expectatur."—S. Raymondi Summæ Lib. II. Tit. iii.

duel with favor as the most practical remedy for the crime of false swearing which was everywhere prevalent. Thus Gundobald assumes that its introduction into the Burgundian code arose from this cause;[1] Charlemagne urged its use as greatly preferable to the shameless oaths which were taken with so much facility;[2] while Otho II., in 983, ordered its employment in various forms of procedure for the same reason.[3] It can hardly be a source of surprise, in view of the warlike manners of the times, and of the enormous evils for which a palliative was sought, that there was felt to be advantage in this mode of impressing upon principals and witnesses the awful sanctity of the oath, thus entailing upon them the liability of supporting their asseverations by undergoing the risks of a combat rendered doubly solemn by imposing religious ceremonies.

Various causes were at work to extend the application of the judicial duel to all classes of cases. In the primitive codes of the barbarians, there is no distinction made between civil and criminal law. Bodily punishment being almost unknown, except for slaves, and nearly all infractions of the law being visited with fines, there was no necessity for such niceties, the matter at stake in all cases being simply money or money's worth. Accordingly, we find the wager of battle used indiscriminately, both as a defence against accusations of crime, and as a mode of settling cases of disputed property, real and personal. Yet some of the earlier codes refer to it but seldom. The Salic law, as we have seen, hardly recognizes its existence; the Ripuarian code alludes to it but four times, and that of the

[1] L. Burgund. Tit. xlv.—The remedy, however, would seem to have proved insufficient, for a subsequent enactment provides an enormous fine (300 solidi) to be levied on the witnesses of a losing party, by way of making them share in the punishment, "Quo facilius in posterum ne quis audeat propria pravitate mentire."—L. Burgund. Tit. lxxx. § 2. The position of witness in those unceremonious days was indeed an unenviable one.

Capit. Car. Mag. ex Lege Longobard. c. xxxiv. (Baluze).

[3] L. Longobard. Lib. II. Tit. iv. § 34.

Alamanni but six times. In others, like the Baioarian, it is appealed to on almost every occasion, and among the Burgundians we may assume, from a remark of St. Agobard, that it superseded all evidence and rendered superfluous any attempt to bring forward witnesses.[1] This variation is probably rather apparent than real, and if in any of these bodies of laws there were originally substantial limitations on its use, in time they disappeared, for it was not difficult to find expedients to justify the extension of a custom which accorded so perfectly with the temper of the age. How little reason was requisite to satisfy the belligerent aspirations of justice is shown by a curious provision in the code of one of the Frisian tribes, by which a man unable to disprove an accusation of homicide was allowed to charge the crime on whomsoever he might select, and then the question between them was decided by combat.[2]

The elasticity, in fact, with which the duel lent itself to the advantage of the turbulent and unscrupulous had no little influence in extending its sphere of action. This feature in its history is well exemplified in a document containing the proceedings of an assembly of local magnates, held in the year 888, to decide a contention concerning the patronage of the church of Lessingon. After the testimony on one side had been given, the opposite party commenced in reply, when the leaders of the assembly, seizing their swords, vowed that they would affirm the truth of the first pleader's evidence with their blood before King Arnoul and his court—and the case was decided without more ado.[3] The strong and the bold are apt to be the ruling spirits in all ages, and were emphatically so in those periods of scarcely curbed violence when the jurisprudence of the European commonwealths was slowly developing itself.

It is no wonder, therefore, that means were readily found for extending the jurisdiction of the wager of battle as widely

[1] Lib. adversus Legem Gundobadi cap. x.

[2] L. Frision. Tit. xiv. § 4.

[3] Goldast. Antiq. Alaman. chart. lxxxv.

as possible. One of the most fruitful of these expedients was the custom of challenging witnesses. The duel was a method of determining questions of perjury, and there was nothing to prevent a suitor, who saw his case going adversely, from accusing an inconvenient witness of false swearing and demanding the "campus" to prove it—a proceeding which adjourned the main case, and likewise decided its result. This summary process, of course, brought every action within the jurisdiction of force, and deprived the judges of all authority to control the abuse. That it obtained at a very early period is shown by a form of procedure occurring in the Bavarian law, already referred to, by which the claimant of an estate is directed to fight, not the defendant, but his witness;[1] and in 819 a capitulary of Louis le Débonnaire gives a formal privilege to the accused on a criminal charge to select one of the witnesses against him with whom to decide the question in battle.[2] It is easy, therefore, to understand the custom, prescribed in some of the codes, by which witnesses were required to come into court armed, and to have their weapons blessed on the altar before giving their testimony. If defeated they were fined, and were obliged to make good to the opposite party any damage which their testimony, had it been successful, would have caused him.[3]

Nor was this merely a temporary extravagance. Late in the thirteenth century, after enlightened legislators had been strenuously and not unsuccessfully endeavoring to limit the abuse of the judicial combat, the challenging of witnesses was still the favorite mode of escaping legal condemnation.[4]

[1] L. Baioar. Tit. XVI. cap. i. § 2.

[2] Capit. Ludov. Pii ann. 819, cap. xv.

[3] L. Baioar. Tit. XVI. c. 5.

[4] Beaumanoir, Coutumes du Beauvoisis, chap. lxi. § 58.—In the contemporary Italian law, however, there was some limitation on the facility of challenging witnesses—"Ita demum inter contrarios testes fit pugna, si ipsi inter se imponant nam pars testibus non potest pugnam imponere nisi velint." —Odofredi Summa de Pugna, c. i. (Patetta, p. 483).

Even in the fourteenth century, the municipal law of Reims, which allowed the duel between principals only in criminal cases, permitted witnesses to be indiscriminately challenged and forced to fight, affording them the privilege of employing champions only on the ground of physical infirmity or advanced age.[1] A still more bizarre extension of the practice, and one which was most ingeniously adapted to defeat the ends of justice, is found in a provision of the English law of the thirteenth century, allowing a man to challenge his own witnesses. Thus in many classes of crimes, such as theft, forgery, coining, etc., the accused could summon a "warrantor" from whom he professed to have received the articles which formed the basis of the accusation. The warrantor could scarcely give evidence in favor of the accused without assuming the responsibility himself. If he refused, the accused was at liberty to challenge him; if he gave the required evidence, he was liable to a challenge from the accuser.[2] The warrantor was sometimes also employed as a champion, and served for hire, but this service was illegal and when detected involved the penalties of perjury.[3] Another mode extensively used in France about the same time was to accuse the principal witness of some crime rendering him incapable of giving testimony, when he was obliged to dispose of the charge by fighting, either personally or by champion, in order to get his evidence admitted.[4]

[1] Lib. Pract. de Consuetud. Remens. §§ 14, 40 (Archives Législat. de Reims, Pt. I. pp. 37, 40).

[2] Bracton de Legibus Angl. Lib. III. Tract. II. cap. xxxvii. § 5.—Fleta, Lib. I. cap. xxii.

[3] Thus in a case in 1220 involving a stolen mare, the accused gave a warrantor, and on the accuser challenging him to battle he gave a second warrantor. On investigation he was found to have received five marks for the service with a promise of five more, and he was mercifully treated by being condemned only to the loss of a foot—"Sciendum quod misericorditer agitur cum eo per consilium domini regis cum majorem pœnam de jure demeruisset."—Maitland, Select Pleas of the Crown, I. 127.

[4] Beaumanoir, chap. vi. § 16.

It is not easy to imagine any cases which might not thus be brought to the decision of the duel; and the evidence of its universality is found in the restriction which prevented the appearance as witnesses of those who could not be compelled to accept the combat. Thus the testimony of women and ecclesiastics was not receivable in lay courts in suits where appeal of battle might arise;[1] and when in the twelfth century special privileges were granted by the kings of France empowering serfs to bear testimony in court, the disability which prevented a serf from fighting with a freeman was declared annulled in such cases, as the evidence was only admissible when the witness was capable of supporting it by arms.[2]

The result of this system was that, in causes subject to such

[1] Beaumanoir, ch. xxxix. §§ 30, 31, 66.—Assises de Jerusalem, cap. 169. A somewhat similar principle is in force in the modern jurisprudence of China. Women, persons over eighty or under ten years of age, and cripples who have lost an eye or a limb are entitled to buy themselves off from punishment, except in a few cases of aggravated crime. They are, therefore, not allowed to appear as accusers, because they are enabled by this privilege to escape the penalties of false witness.—Staunton, Penal Code of China, Sects. 20–22, and 339. In the ancient Brahmanic law also there is a long enumeration of persons who are not receivable as witnesses, including women, children, and men over eighty years of age. In this, however, the exclusion of women would appear to be because they were presumably under tutelage.—Institutes of Vishnu, VIII. 2.

The exclusion of women as witnesses during the mediæval period was also one of the numerous disabilities by which the Church expressed its contempt for the sex which had tempted Adam to his fall. As early as the fourth century Hilary the Deacon, in a tract which long passed current under the name of St. Augustin, says: "Nec docere enim potest, nec testis esse, neque fidem dicere, neque judicare" (Hilari Diac. Quæstt. ex Vet. Testamento, c. xlv.—Migne, T. XXX. p. 2244). And this was carried through Ivo of Chartres (Decreti, P. VIII. c. 85) into the body of the canon law (Gratiani Decr. Caus. XXXIII. Q. V. cap. 17).

[2] The earliest of these charters is a grant from Louis le Gros in 1109 to the serfs of the church of Paris, confirmed by Pope Pascal II. in 1113 (Baluz. et Mansi III. 12, 62). D'Achery (Spicileg. III. 481) gives another from the same monarch in 1128 to the church of Chartres.

appeals, no witness could be forced to testify, by the French law of the thirteenth century, unless his principal entered into bonds to see him harmless in case of challenge, to provide a champion, and to make good all damages in case of defeat;[1] though it is difficult to understand how this could be satisfactorily arranged, since the penalties inflicted on a vanquished witness were severe, being, in civil causes, the loss of a hand and a fine at the pleasure of the suzerain, while in criminal actions "il perderoit le cors avecques."[2] The only limit to this abuse was that witnesses were not liable to challenge in cases concerning matters of less value than five sous and one denier.[3]

If the position of a witness was thus rendered unenviable, that of the judge was little better. As though the duel had not received sufficient extension by the facilities for its employment just described, another mode of appealing to the sword in all cases was invented by which it became competent for the defeated party in any suit to challenge the court itself, and thus obtain a forcible reversal of judgment. It must be borne in mind that this was not quite as absurd a practice as it may seem to us in modern times, for under the feudal system the dispensing of justice was one of the most highly prized attributes of sovereignty; and, except in England, where the royal judges were frequently ecclesiastics, the seignorial courts were presided over by warriors. In Germany, indeed, where the magistrates of the lower tribunals were elective, they were required to be active and vigorous of body.[4] Towards the end of the twelfth century in England we find Glanville acknowledging his uncertainty as to whether or not the court could depute the settlement of such an appeal to a champion, and also as to what, in case of defeat, was the legal position of

[1] Beaumanoir, chap. lxi. § 59.

[2] Ibid. chap. lxi. § 57.

[3] Ibid. chap. xl. § 21.

[4] Jur. Provin. Alaman. cap. lxviii. § 6.

the court thus convicted of injustice.[1] These doubts would seem to indicate that the custom was still of recent introduction in England, and not as yet practised to an extent sufficient to afford a settled basis of precedents for its details. Elsewhere, however, it was firmly established. In 1195, the customs of St. Quentin allow to the disappointed pleader unlimited recourse against his judge.[2] Towards the latter half of the thirteenth century, we find in the *Conseil* of Pierre de Fontaines the custom in its fullest vigor and just on the eve of its decline. No restriction appears to be imposed as to the cases in which appeal by battle was permitted, except that it was not allowed to override the customary law.[3] The suitor selected any one of three judges agreeing in the verdict; he could appeal at any stage of the proceedings when a point was decided against him; if unsuccessful, he was only liable in a pecuniary penalty to the judges for the wrong done them, and the judge, if vanquished, was exposed to no bodily punishment.[4] The villein, however, was not entitled to the privi-

[1] "Curia . . . tenetur tamen judicium suum tueri per duellum . . . Sed utrum curia ipsa teneatur per aliquem de curia se defendere, vel per alium extraneum hoc fieri possit, quero" (De Leg. Angliæ Lib. VIII. cap. ix.). The result of a reversal of judgment must probably have been a heavy fine and deprivation of the judicial function, such being the penalty provided for injustice in the laws of Henry I.—"Qui injuste judicabit, cxx sol. reus sit et dignitatem judicandi perdat" (L. Henrici I. Tit. xiii. § 4)—which accords nearly with the French practice in the time of Beaumanoir.

[2] Cited by Marnier in his edition of Pierre de Fontaines.

[3] Car poi profiteroient les costumes el païs, s'il s'en covenoit combatre; ne dépecier ne les puet-om par bataille.—Édition Marnier, chap. XXII. Tit. xxxii.

[4] Chap. XXII. Tit. i. vi. viii. x. xxvii. xxxi.—"Et certes en fausement ne gist ne vie ne menbre de cels qui sont fausé, en quelconques point que li fausemenz soit faiz, et quele que la querele soit" (Ibid. Tit. xix.). If the judge was accused of bribery, however, and was defeated, he was liable to confiscation and banishment (Tit. xxvi.). The increasing severity meted out to careless, ignorant, or corrupt judges manifests the powerful influence of the Roman law, which, aided by the active efforts of legists, was

lege, except by special charter.[1] While the feudal system was supreme, this appeal to arms was the only mode of reversing a judgment, and an appeal in any other form was an innovation introduced by the extension of the royal jurisdiction under St. Louis, who labored so strenuously and so effectually to modify the barbarism of feudal institutions by subordinating them to the principles of the Roman jurisprudence. De Fontaines, indeed, states that he himself conducted the first case ever known in Vermandois of an appeal without battle.[2] At the same time the progress of more rational ideas is manifested by his admission that the combat was not necessary to reverse a judgment manifestly repugnant to the law, and that, on the other hand, the law was not to be set aside by the duel.

Twenty years later, we find in Beaumanoir abundant evidence of the success of St. Louis in setting bounds to the abuses which he was endeavoring to remove. The restrictions which he enumerates are greatly more efficacious than those alluded to by de Fontaines. In capital cases, the appeal did not lie; while in civil actions, the suzerain before whom the appeal was made could refuse it when the justice of the verdict was self-evident. Some caution, moreover, was requisite in conducting such cases, for the disappointed pleader who did not manage matters rightly might find himself pledged to a combat, single handed, with all his judges at once; and as the bench consisted of a collection of the neighboring gentry, the result might be the confirmation of the sentence in a manner more emphatic than agreeable. An important change is likewise observable in the severe penalty imposed upon a judge

infiltrating the customary jurisprudence and altering its character everywhere. Thus de Fontaines quotes with approbation the Code, *De pœna judicis* (Lib. VII. Tit. xlix. l. 1) as a thing more to be desired than expected, while in Beaumanoir we already find its provisions rather exceeded than otherwise.

[1] De Fontaines, chap. XXII. Tit. iii.

[2] Ibid. chap. XXII. Tit. xxiii.—Et ce fu li premiers dont je oïsse onques parler qui fust rapelez en Vermendois sanz bataille.

vanquished in such an appeal, being a heavy fine and deprivation of his functions in civil cases, while in criminal ones it was death and confiscation—"il pert le cors et quanques il a."[1]

The king's court, however, was an exception to the general rule. No appeals could be taken from its judgments, for there was no tribunal before which they could be carried.[2] The judges of the royal court were therefore safe from the necessity of vindicating their decisions in the field, and they even carried this immunity with them and communicated it to those with whom they might be acting. De Fontaines accordingly advises the seigneur justicier who anticipates the appeal of battle in his court to obtain a royal judge to sit with him, and mentions an instance in which Philip (probably Philip Augustus) sent his whole council to sit in the court of the Abbey of Corbie, when an appeal was to be entered.[3]

By the German law of the same period, the privilege of reversing a sentence by the sword existed, but accompanied with regulations which seem evidently designed to embarrass, by enormous trouble and expense, the gratification of the impulse which disappointed suitors would have to establish their claims in such manner. Thus, by the Suabian law, it could only be done in the presence of the sovereign himself, and not in that of the immediate feudal superior;[4] while the Saxon code

[1] Coutumes du Beauvoisis, chap. lxi. §§ 36, 45, 47, 50, 62.—It should be borne in mind, however, that Beaumanoir was a royal bailli, and the difference between the "assise de bailli" and the "assises de chevaliers" is well pointed out by Beugnot (Les Olim, T. II. pp. xxx. xxxi.). Beaumanoir in many cases evidently describes the law as he would wish it to be.

[2] Et pour ce ne l'en puët fausser, car l'en ne trouveroit mie qui droit en feist car li rois ne tient de nului fors de Dieu et de luy.—Établissements, Liv. I. chap. lxxviii.

[3] Conseil, ch. XXII. tit. xxi.

[4] Si contingat ut de justitia sententiæ pugnandum sit, illa pugna debet institui coram rege (Jur. Provin. Alaman. cap. xcix. § 5—Ed. Schilt.). In a French version of this code, made probably towards the close of the fourteenth century, the purport of this passage is entirely changed. "De chascun iugemant ne puet lan trover leaul ne certain consoil si bien come

requires the extraordinary expedient of a pitched battle, with seven on each side, in the king's presence.[1] It is not a little singular that the feudal law of the same period has no allusion to the custom, all appeals being regularly carried to and heard in the court of the suzerain.[2]

CHAPTER IV.

CONFIDENCE REPOSED IN THE JUDICIAL DUEL.

Thus carefully moulded in conformity with the popular prejudices or convictions of every age and country, it may readily be imagined how large a part the judicial combat played in the affairs of daily life. It was so skilfully interwoven throughout the whole system of jurisprudence that no one could feel secure that he might not, at any moment, as plaintiff, defendant, or witness, be called upon to protect his estate or his life either by his own right hand or by the club of some professional and possibly treacherous bravo. This organized violence assumed for itself the sanction of a religion of love and peace, and human intelligence seemed too much blunted to recognize the contradiction.

There was, in fact, no question which might not be submitted to the arbitrament of the sword or club. If Charlemagne, in dividing his vast empire, forbade the employment

per le consoil de sages de la cort le roi."—Miroir de Souabe, P. I. c. cxiii. (Ed. Matile, Neufchatel, 1843). We may hence conclude that by this period the custom of armed appeal was disused, and the extension of the royal jurisdiction was established.

[1] Jur. Provin. Saxon. I. 18; II. 12.—This has been questioned by modern critics, but there seems to be no good reason for doubting its authority. The whole formula for the proceeding is given in the Richstich Landrecht (cap. 41), a manual of procedure of the fourteenth century, adapted to the Saxon code.

[2] Richstich Lehnrecht, cap. xxvii.

of the wager of battle in settling the territorial questions which might arise between his heirs,[1] the prohibition merely shows that it was habitually used in affairs of the highest moment, and the constant reference to it in his laws proves that it was in no way repugnant to his general sense of justice and propriety.

The next century affords ample evidence of the growing favor in which the judicial combat was held. About the year 930, Hugh, King of Provence and Italy, becoming jealous of his uterine brother, Lambert, Duke of Tuscany, asserted him to be a supposititious child, and ordered him in future to claim no relationship between them. Lambert, being "vir . . . bellicosus et ad quodlibet facinus audax," contemptuously denied the aspersion on his birth, and offered to clear all doubts on the subject by the wager of battle. Hugh accordingly selected a warrior named Teudinus as his champion; Lambert was victor in the ensuing combat, and was universally received as the undoubted son of his mother. His triumph, however, was illegally brought to a sudden close, for Hugh soon after succeeded in making him prisoner and deprived him of eyesight.[2] Still, the practice continued to be denounced by some enlightened ecclesiastics, represented by Atto, Bishop of Vercelli, who declared it to be totally inapplicable to churchmen and not to be approved for laymen on account of the uncertainty of its results;[3] but representations of this kind were useless. About the middle of the century, Otho the Great appears, throwing the enormous weight of his influence in its favor. As a magnanimous and warlike prince, the wager of battle appears to have possessed peculiar attraction for his chivalrous instincts, and he extended its application as far as lay in his power. Not only did he force his daughter Liutgarda, in defending herself from a villanous accusation, to

[1] Carol. Mag. Chart. Divisionis ann. 806 cap. xiv.

[2] Liutprandi Antapodos, Lib. III. cap. 46.

[3] De Pressuris Eccles. Pt. II. This was written about 945.

forego the safer modes of purgation, and to submit herself to the perilous decision of a combat,[1] but he also caused the abstract question of representation in the succession of estates to be settled in the same manner; and to this day in Germany the division of a patrimony among children and grandchildren is regulated in accordance with the law enacted by the doughty arms of the champions who fought together nine hundred years ago at Steil.[2] There was no question, indeed, which according to Otho could not be satisfactorily settled in this manner. Thus when, in 963, he was indulging in the bitter recriminations with Pope John XII. which preceded the subjugation of the papacy under the Saxon emperors, he had occasion to send Bishop Liutprand to Rome to repel certain accusations brought against him, and he ordered the armed followers of his ambassador to sustain his assertions by the duel; a proposition promptly declined by the pontiff, skilled though he was in the use of weapons.[3] A duellist, in fact, seems to have been reckoned a necessary adjunct to diplomacy, for when, in 968, the same Liutprand was dispatched by Otho to Constantinople on a matrimonial mission, and during the negotiations for the hand of Theophania a discussion arose as to the circumstances which had led to Otho's conquest of Italy, the warlike prelate offered to prove his veracity by the sword of one of his attendants: a proposition which put a triumphant end to the argument.[4] A more formal assertion of the diplomatic value of the duel was made when in 1177 the conflicting claims of the kings of Castile and Navarre were referred to Henry II. of

[1] Dithmari Chron. Lib. II. ann. 950.

[2] Widukind. Rer. Saxon. Lib. II. cap. x.—The honest chronicler considers that it would have been discourteous to the nobility to treat questions relating to them in a plebeian manner. "Rex autem meliori consilio usus, noluit viros nobiles ac senes populi inhoneste tractari, sed magis rem inter gladiatores discerni jussit." In both these cases Otho may be said to have had ancient custom in his favor. See L. Longobard. Lib. I. Tit. xii. § 2.—L. Alamann. cap. LVI., LXXXIV.; Addit. cap. XXII.

[3] Liutprandi Hist. Otton. cap. vii.

[4] Liutprandi Legat. cap. vi.

England for adjudication, and both embassies to the English court were supplied with champions as well as with lawyers, so as to be prepared in case the matter was submitted to the duel for decision.[1]

Nor were these solitary instances of the reference of the mightiest state questions to the chances of the single combat. Allusion has already been made to the challenge which passed between Charles of Anjou and Pedro of Aragon, and not dissimilar was that which resulted from the interview at Ipsch in 1053 between the Emperor Henry III. of Germany and Henry I. of France.[2] A hundred years earlier, in 948, when, at the Synod of Ingelheim, Louis d'Outremer invoked the aid of the Church in his death-struggle with the rising race of Capet, he closed the recital of the wrongs endured at the hands of Hugh le grand by offering to prove the justice of his complaints in single combat with the aggressor.[3] When the battle ordeal was thus thoroughly incorporated in the manners of the age, we need scarcely be surprised that, in a life of St. Matilda, written by command of her son Otho the Great, the author, after describing the desperate struggles of the Saxons against Charlemagne, should gravely inform us that the war was at last concluded by a duel between the Christian hero and his great antagonist Witikind, religion and empire being both staked on the issue as a prize of the victor; nor does the pious chronicler shudder at the thought that the destiny of Christianity was intrusted to the sword of the Frank.[4] His story could not seem improbable to those who witnessed in 1034 the efforts of Conrad the Salic to pacify the Saxon marches. On his inquiring into the causes of the mutual devastations of the neighboring races, the Saxons, who were really the aggressors, offered to prove by the duel that the

[1] Benedict. Abbat. Gesta Henrici II. p. 139 (M. R. Series).

[2] Lambert. Hersfeld. ann. 1056.

[3] Conquest. Ludov. in Synod. Ingilheim. ann. 948.

[4] S. Mathild. Regin. Vit. c. 1.

Pagan Luitzes were in fault, trusting that their Christianity would overbalance the injustice of their cause. The defeat of their champion by his heathen adversary was, however, a memorable example of the impartial justice of God, and was received as a strong confirmation of the value of the battle trial.[1]

The second Otho was fully imbued with his father's views, and so completely did he carry them out, that in a gloss on the Lombard law he is actually credited with the introduction of the duel.[2] In the preceding essay, allusion has been made to his substitution of the judicial combat for the compurgatorial oath in 983, and about the same period he made an exception, in favor of the battle ordeal, to the immemorial policy of the barbarians which permitted to all subject races the enjoyment of their ancestral usages. At the council of Verona, where all the nobles of Italy, secular and ecclesiastical, were assembled, he caused the adoption of a law which forced the Italians in this respect to follow the customs of their conquerors.[3] Even the church was deprived of any exemption which she might previously have enjoyed, and was only allowed the privilege of appearing by her *advocati* or champions.[4] There were small chances of escape from the stringency of these regulations, for an edict of Otho I. in 971 had decreed the punishment of confiscation against any one who should refuse to undergo the chances of the combat.[5] It may even be assumed, from the wording of a constitution of the Emperor Henry II., that in the early part of the eleventh century it was no longer necessary that there should be a doubt as to the guilt of the accused to entitle him to the privileges of the combat, and that even the most notorious criminal could have a chance of escape by an appeal to the sword.[6]

[1] Wipponis vit. Chunradi Salici.

[2] "Nos belli dono ditat rex maximus Otto."

[3] L. Longobard. Lib. II. Tit. lv. § 38. [4] Ibid. § 34.

[5] Si non audeat, res suæ infiscentur.—Convent. Papiens. ann. 971.

[6] Qui vero infra treugam, post datum osculum pacis, alium hominem interfecerit, et negare voluerit, pugnam pro se faciat.—L. Longobard. Lib. I. Tit ix. § 38.

Thus it came to pass that nearly every question that could possibly arise was finally deemed liable to the decision of the wager of battle. If Otho the Great employed champions to legislate respecting a disputed point of law, he was not more eccentric than the Spaniards, who settled in the same manner a controversy regarding the canonical observances of religion, when Gregory VII. endeavored to force the introduction of the Roman liturgy into Castile and Leon, in lieu of the national Gothic or Mozarabic rite. With considerable difficulty, some years before, Navarre and Aragon had been led to consent to the change, but the Castilians were doggedly attached to the observances of their ancestors, and stoutly refused compliance. In 1077, Alfonso I. procured the assent of a national council, but the people rebelled, and after repeated negotiations the matter was finally referred to the umpirage of the sword. The champion of the Gothic ritual was victorious, and tradition adds that a second trial was made by the ordeal of fire; a missal of each kind was thrown into the flames, and the national liturgy emerged triumphantly unscathed.[1]

Nearly contemporary with this was the celebrated case of Otho, Duke of Bavaria, perhaps the most noteworthy example of a judicial appeal to the sword. A worthless adven-

[1] Roderici Toletani de Reb. Hispan. VI. xxvi. This story has been called in question by orthodox writers for the reason that Archbishop Roderic, who flourished in the middle of the thirteenth century, is the only authority for it, but there is nothing in the manners of the age to render it incredible, and he mentions that the champion of the Mozarabic rite came from Matanza near the Pisuerga, and that his family still existed.

In 1121, when the Queen-regent Urraca was at Compostella, one of her courtiers informed a gentleman of the Archbishop Diego Gelmirez, that she was plotting to seize him, whereupon he surrounded himself with a guard. This attracted attention and led to discussion in which the archbishop's retainer gave the name of his informant. The latter denied the statement and Urraca, as a matter of course, ordered the duel between them, in which her courtier was defeated and was punished with blinding.—Historia Compostellana, Lib. II. c. xxix. (Florez, España Sagrada, T. XX. p. 312).

turer, nāmed Egeno, accused Otho of conspiring against the life of Henry IV. In a diet held at Mainz, the duke was commanded to disprove the charge by doing battle with his accuser within six weeks. According to some authorities, his pride revolted at meeting an adversary so far his inferior; according to others, he was prevented from appearing in the lists only by the refusal of the emperor to grant him a safe conduct. Be this as it may, the appointed term elapsed, his default of appearance caused judgment to be taken against him, and his duchy was accordingly confiscated. It was bestowed on Welf, son of Azo d'Este and of Cunigunda, descendant and heiress of the ancient Guelfic Agilolfings; and thus, on the basis of a judicial duel, was founded the second Bavarian house of Guelf, from which have sprung so many royal and noble lines, including their Guelfic Majesties of Britain. Some years later, the emperor himself offered to disprove by the same means a similar accusation brought against him by a certain Reginger, of endeavoring to assassinate his rival, Rodolph of Suabia. Ulric of Cosheim, however, who was involved in the accusation, insisted on taking his place, and a day was appointed for the combat, which was prevented only by the opportune death of Reginger.[1]

Scarcely less impressive in its results, and even more remarkable in itself, as exhibiting the duel invested with legislative as well as judicial functions, is the case wherein the wager of battle was employed in 1180 to break the overgrown power of Henry the Lion. That puissant Duke of Saxony and Bavaria had long divided the power of the empire and defied the repeated efforts of Frederic Barbarossa to punish his constantly recurring rebellions. Cited to appear and answer for his treasons in successive diets, he constantly refused, on the plea that the law required him to have a trial within his own dominions. At length, in the diet of Würz-

[1] Lambert. Hersfeld. ann. 1070, 1073, 1074.—Conrad. Ursperg. ann. 1071.—Bruno de Bello Saxonico.

burg, a noble arose and declared himself ready to prove by the single combat that the emperor could legally cite his princes before him at any place that he might select within the limits of the empire. Of course there was none to take up the challenge, and Frederic was enabled to erect the principle thus asserted into a binding law. Henry was condemned by default, and his confiscated possessions were shared between those who had arranged and enacted the comedy.[1]

No rank of life in fact procured exemption from the duel between antagonists of equal station. When in 1002, on the death of Otho III., the German throne was filled by the election of Henry the Lame, Duke of Bavaria, one of his disappointed competitors, Hermann, Duke of Suabia, is said to have demanded that their respective claims should be determined by a judicial combat, and the new king, feeling himself bound to accept the wager of battle, proceeded to the appointed place, and waited in vain for the appearance of his antagonist.[2] Thus the champion of England, who until 1821 figured in the coronation pageant of Westminster Abbey, was a relic of the times when it was not an idle ceremony for the armed and mounted knight to fling the gauntlet and proclaim aloud that he was ready to do battle with any one who challenged the right of the new monarch to his crown.[3] A striking example of the liability attaching to even the most exalted rank is afforded by a declaration of the privileges of the Duchy of Austria, granted by Frederic Barbarossa in 1156, and confirmed by Frederic II. in 1245. These privileges rendered the dukes virtually independent sovereigns, and among them is enumerated the right of employing a champion to represent the reigning duke when summoned to the judicial duel.[4] Even more instructive is the inference deducible from the For de Morlaas, granted to his subjects by Gaston IV. of

[1] Conrad. Ursperg. ann. 1175. [2] Dithmari Chron. Lib. v.

[3] From the time of Henry I., the office of king's champion was one of honor and dignity. See Spelman's Glossary.

[4] Constit. Frid. II. ann. 1245 cap. 9 (Goldast. Const. Imp. I. 303).

Béarn about the year 1100. The privileges contained in it are guaranteed by a clause providing that, should they be infringed by the prince, the injured subject shall substantiate his complaint by his simple oath, and shall not be compelled to prove the illegality of the sovereign's acts by the judicial combat, thus indicating a pre-existing custom of the duel between the prince and his vassals.[1]

It is not to be supposed, however, from these instances that the duel was an aristocratic institution, reserved for nobles and affairs of state. It was an integral part of the ordinary law, both civil and criminal, employed habitually for the decision of the most every-day affairs. Thus a chronicler happens to mention that in 1017 the Emperor St. Henry II. coming to Merseburg hanged a number of robbers who had been convicted in single combat by champions, and then proceeding to Magdeburg he had all the thieves assembled and treated them in the same manner.[2] So much was it a matter of course, that, by the English law of the thirteenth century, a pleader was sometimes allowed to alter the record of his preliminary plea, by producing a man who would offer to prove with his body that the record was incorrect, the sole excuse for the absurdity being that it was only allowed in matters which could not injure the other side;[3] and a malefactor turning king's evidence was obliged, before receiving his pardon, to pledge himself to convict all his accomplices, if required, by the duel.[4]

The habitual use of such a method of administering justice required no little robustness of faith in the expected intervention of God to control the event. Even in the fifteenth century, when the combat was rapidly becoming obsolete, this faith is pictorially embodied in an illuminated MS. of Tallhöfer's Kamprecht, where a miniature represents the victor kneeling

[1] For de Morlaas, Rubr. xxvi.

Dithmari Chron. Lib. VII. c. 36, 37.—"Ibi tunc multi latrones a gladiatoribus in singulari certamine devicti suspendio perierunt."

Bracton. Lib. III. Tract. ii. cap. 37, § 5.

[4] Bracton. Lib. III. Tract. ii. cap. 33, § 2; 34, § 2.

and returning thanks to God, while the vanquished is lying on his back with Satan grasping at his open mouth as though already seizing the soul of the criminal.[1] This robustness of faith was proof against experience and common sense, and sought to explain the frequent miscarriage of justice by any process of reasoning rather than the right one. Thus about the year 1100 a sacrilegious thief named Anselm stole the sacred vessels from the church of Laon and sold them to a merchant, from whom he exacted an oath of secrecy. Frightened at the excommunications fulminated by the authorities of the plundered church, the unhappy trader revealed the name of the robber. Anselm denied the accusation, offered the wager of battle, defeated the unfortunate receiver of stolen goods, and was proclaimed innocent. Encouraged by impunity, he repeated the offence, and after his conviction by the ordeal of cold water he confessed the previous crime. The doubts cast by this event on the efficacy of the judicial combat were, however, happily removed by the suggestion that the merchant had suffered for the violation of the oath which he had sworn to Anselm, and the reputation of the duel remained intact.[2]

The frequent cases of this nature often did not admit of so ingenious an explanation of the criminal's escape, and legal casuists assumed a condition of being, guilty in the sight of God, but not in that of man—a refinement of speculation which even finds place in the German codes of the thirteenth century;[3]

[1] Dreyer, Anmerckung von den ehemaligen Quellgesetzen, p. 156.

[2] Guibert. Noviogent. de Vita sua Lib. III. cap. xvi.—Hermann. de Mirac. S. Mariæ Laudun. Lib. III. cap. 28.—Forsitan, ut multi putarunt, pro fidei violatæ reatu, qua promiserat fidem Anselmo, quod eum non detegeret.

[3] Und diser vor Got schuldig, und vor den luten nit (Jur. Provin. Alamann. cap. ccxix. § 8). This is a provision for cases in which a thief accuses a receiver of having suggested and assisted in the crime. The parties are made to fight, when, if the receiver is worsted, both are hanged; if the thief, he alone, and the receiver escapes though criminal. The French version enlarges somewhat on the principle involved: "Se il puet vancre

and men contented themselves then, as they do still, with predicting future misfortunes and an eternity of punishment. The more direct solution, in cases of unjust condemnation, was very much like that which justified the defeat of Anselm's merchant —that the unfortunate victim, though innocent of the special offence charged, suffered in consequence of other sins. This doctrine was even supported by the infallible authority of the papacy, as enunciated in 1203 by Innocent III. in a case wherein the priory of St. Sergius was unjustly convicted of theft by the judicial duel, and its possessions were consequently seized by the authorities of Spoleto.[1]

An example justifying this theory is found in the case of Henry of Essex in 1163. He was a favorite of Henry II. and one of the most powerful nobles of his day, till he was accused of treason by his kinsman Robert de Montfort for having abandoned his king when in desperate straits in the Welsh war of 1157. A duel ensued, fought on an island of the Thames near Reading, in presence of an immense assemblage. Henry had been a bad neighbor to the Abbey of St. Edmund, and when engaged in the desperate contest he was dismayed at seeing the angry saint hovering in the air and threatening him; nor was this all, for Gilbert de Cerivilla, whom he had unjustly put to death, likewise appeared and menaced him. The inevitable result of this was his defeat; he was left for dead on the field, but at the instance of his powerful kindred his body was allowed Christian burial in the Abbey of Reading. Carried thither he unexpectedly revived and embraced a religious life in the abbey, where years afterwards he related the story of his discomfiture to the veracious chronicler who has handed it down.[2]

lautre il est quites et li autre sera panduz, et sera an colpe anver lo munde et anver dex andui: ce avient a assez de genz, que aucons sunt an colpe anver dex et ne mie anver le seigle" (Miroir de Souabe, P. II. c. vi.).

[1] Innoc. PP. III. Regest. VI. 26 (c. 2 Extra, v. 35)—"Duellum in quo aliis peccatis suis præpedientibus, ceciderunt."

[2] Chron. Jocelini de Brakelonda (Ed. Camden Soc. pp. 50–2).

That the combatants themselves did not always feel implicit confidence in the event, or rely solely upon the righteousness of their cause, is shown by the custom of occasionally bribing Heaven either to assist the right or to defend the wrong. Thus, in the eleventh century, we find the monastery of St. Peter at Bèze in the enjoyment of certain lands bestowed on the Saint by Sir Miles the Stammerer, who in this way endeavored to purchase his assistance in a combat about to take place—a bargain no doubt highly appreciated by the worthy monks.[1] According to the belief of the pious, Heaven might be propitiated by less venal means, for Cæsarius of Heisterbach relates on the authority of an eye-witness that when Henry VI. entered Lombardy in 1196, a castellan was accused before him of oppression and rapine by his neighbors, who produced a champion of enormous size to vindicate their cause. The Emperor decreed the battle, when the brother of the accused offered himself for the defence—a slender and most unequal antagonist. He prepared himself for the strife, however, by assiduous confession and prayer, and easily overcame his huge adversary; and thus, exclaims the worthy chronicler, a guilty man escaped the death he had deserved, solely by virtue of the humble confession of his brother.[2] Cæsarius also mentions another case, in a duel decreed by Frederic Barbarossa between a knight and a gigantic champion, where the inequality was more than counterbalanced by the fact that the knight piously took the precaution of receiving the sacrament before entering the lists, and thus was enabled to overcome his adversary.[3]

Less creditable means were sometimes employed, and men did not hesitate, with the unreasoning inconsistency characteristic of superstition, to appeal to God and at the same time

[1] Isdem quoque Milo . . . monomachi certaturus pugna, attribuit sancto Petro terram quam habebat in Luco, prope atrium ecclesiæ, quo sibi adjutor in disposito bello existerit.—Chron. Besuense, Chart. de Luco.

[2] Cæsar. Heisterbach. Dial. Mirac. Dist. III. c. xviii.

[3] Ibid. Dist. IX. c. xlviii.

endeavor to influence God's judgment by the use of unlawful expedients. This was not confined to the laity. In 1355 there was an important suit between the Bishop of Salisbury and the Earl of Salisbury respecting the ownership of a castle, in which the combat was adjudged. When the champions entered the lists the customary examination of their arms and accoutrements was made, and the combat was adjourned in consequence, as it was said, of finding in the coat of the episcopal champion certain rolls containing prayers and charms. The case was finally compromised by the bishop paying fifteen hundred marks to the earl for the disputed property.[1] That precautions against such devices were deemed necessary is shown by the oath required of all combatants, whether principals or champions, that they had on them no charms or conjurations to affect the result.[2] A quaint formula for this is the oath of the champion in the case of Low *vs.* Paramore in 1571 —"This hear you justices that I have this day neither eat, drunk, nor have upon me either bone, stone, ne glass or any enchantment, sorcery, or witchcraft where-through the power of the Word of God might be inleased or diminished and the devil's power increased, and that my appeal is true, so help me God and his saints and by this Book."[3]

[1] Neilson's Trial by Combat, p. 152.

[2] Odofredi Summa de Pugna (Patetta, p. 487).—The oath prescribed in the Ordonnance of Philippe le Bel in 1306 is very elaborate—"Par les seremens que j'ay fais je n'entens pourter sur moy ne sur mon cheval paroles, pierres, herbes, charmes, charroiz, ne conjurations, invocations d'ennemis [demons] ne nulle autre chose ou j'aye esperance d'avoir ayde ne à luy nuire. Ne n'ay recours fors que à Dieu et à mon bon droit, par mon corps, par mon cheval et par mes armes. Et sur ce je baise ceste vraye croix et les saincts evangiles, et me tais."—Isambert, Anc. Lois Françaises, II. 843.

[3] Stow's Annals, ann. 1571 (Ed. 1615, p. 669).

CHAPTER V.

LIMITATIONS ON THE WAGER OF BATTLE.

THE right of demanding the wager of battle between principals varied much with the age and race, though as a "bilateral" ordeal, as a rule, from the earliest times either party was entitled to claim it.[1] When Beaumanoir composed his *Coutumes du Beauvoisis*, in 1283, the practice may be considered to have entered upon its decadence; twenty years had elapsed since the determined efforts of St. Louis to abolish it; substitutes for it in legal processes had been provided; and the manner in which that enlightened jurist manifests his preference for peaceful forms of law shows that he fully appreciated the civilizing spirit in which the monarch had endeavored to soften the ferocity of his subjects. When, therefore, we see in Beaumanoir's treatise how few restrictions existed in his time, we may comprehend the previous universality of the custom. In criminal cases, if an accuser offered battle, the defendant was forced either to accept it or to confess his guilt, unless he could prove an alibi, or unless the accuser was himself notoriously guilty of the crime in question, and the accusation was evidently a mere device to shift the guilt to the shoulders of another; or unless, in case of murder, the victim had disculpated him, when dying, and had named the real criminals.[2] If, on the other hand, the accused demanded to wage his battle, the judge could only refuse it when his guilt was too notorious for question.[3] A serf could not challenge a freeman, nor a bastard a man of legitimate birth (though an

[1] Ll. Frision. Tit. IX. § 3.

[2] Coutumes du Beauvoisis, chap. lxi. § 2; chap. xliii. § 6.

[3] Ibid. chap. lxi. § 2; chap. xxxix. § 12.

appeal of battle might lie between two bastards), nor a leper a sound man.[1] In civil actions, the battle trial was not allowed in cases relating to dower, to orphans under age,[2] to guardianships, or to the equity of redemption afforded by the feudal laws to kinsmen in the sale of heritable property, or where the matter at stake was of less value than twelve deniers.[3] St. Louis also prohibited the duel between brothers in civil cases, while permitting it in criminal accusations.[4] The slenderness of these restrictions shows what ample opportunities were afforded to belligerent pleaders.[5]

In Germany, as a general rule, either party had a right to demand the judicial combat,[6] subject, however, in practice, to several important limitations. Thus, difference of rank between the parties afforded the superior a right to decline a challenge, as we shall see more fully hereafter.[7] Relationship between the contestants was also an impediment, of which either might avail himself,[8] and even the fact that the defendant was not a native of the territory in which the action was brought gave him the privilege of refusing the appeal.[9] Still,

[1] Coutumes du Beauvoisis, chap. lxiii. §§ 1, 2, 10.

[2] Twenty-one years is the age mentioned by St. Louis as that at which a man was liable to be called upon to fight.—Établissements, Liv. I. chap. lxxiii., cxlii.

[3] Coutumes du Beauvoisis, chap. lxiii. §§ 11, 13, 18. The denier was the twelfth part of the solidus or sou.

[4] Établissements, Liv. I. chap. clxvii.

[5] In contemporary Italy the great jurist Roffredo gives a long enumeration of the cases in which the duel is admitted covering nearly the whole of the more serious criminal actions and a number of civil suits.—Odofredi Summa de Pugna (Patetta, pp. 480–4).

[6] Jur. Provin. Alaman. cap. clxvi. §§ 13, 27; cap. clxxvii. (Ed. Schilt.). —Jur. Prov. Saxon. Lib. I. clxviii.

[7] This rule was strictly laid down as early as the time of Frederic Barbarossa.—Feudor. Lib. II. Tit. xxvii. § 3.

[8] Jur. Provin. Alaman. cap. ccclxxxvi. § 2 (Ed. Schilteri).—Jur. Provin. Saxon. Lib. I. c. lxiii.—Sachsische Weichbild, xxxv. 6.

[9] Jur. Provin. Alaman. cap. ccxcii. § 2.—Jur. Provin. Saxon. Lib. III. c. xxvi. xxxiii.

we find the principle laid down even in the fourteenth century that cases of homicide could not be determined in any other manner.[1] There were circumstances, indeed, in which the complainant, if he could bring the evidence of seven witnesses in his favor, could decline the duel; but if he choose to prove the charge by the combat, no examination or testimony was admitted. In the same way, if a man was slain while committing theft or robbery, and was prosecuted for the crime, the accuser was not bound to offer the duel if he could produce the evidence of seven witnesses; but if a relative of the dead man offered to vindicate him by combat, this annulled all the evidence, and conviction could not be had without the battle ordeal.[2] A curious provision in the Saxon burgher law allowed a man who had been assaulted to challenge to the duel as many men as he had wounds—but the wounds were required to be of a certain degree of severity—*wunden kampffbaren*.[3] So the contemporary law of Suabia provides that in accusations of personal violence, the duel was not to be allowed, unless the injury inflicted on the complainant had been sufficiently serious to cause permanent maiming,[4] thus showing how thoroughly different in spirit was the judicial combat from the modern code of honor which has been affiliated upon it. Yet a general rule is found expressed to the effect that it was necessary only in cases where no other evidence was obtainable, when the result could be safely left to the judgment of Omniscience.[5]

[1] Sed scias si de perpetrato homicidio agitur, probationem sine duello non procedere.—Richstich Landrecht, cap. xlix.

[2] Jur. Provin. Alaman. cap. ccclxxxvi. §§ 28, 29 (Ed. Schilteri).—Jur. Prov. Saxon. Lib. I. art. 64.—Sachsische Weichbild, art. lxxxvii. lxxxviii.

[3] Sachsische Weichbild, lxxxi. If he accused more than the number of his wounds, they could defend themselves with six compurgators.

[4] Jur. Provin. Alaman. cap. clxxii. § 20 (Ed Senckenberg).

[5] Hinc pervenit dispositio de duello. Quod enim homines non vident Deo nihilominus notum est optime, unde in Deo confidere possumus, eum duellum secundum jus diremturum.—Jur. Provin. Alaman. cap. clxviii. § 19 (Ed. Senckenberg).

In a formula of application for the duel, given by Hermann de Bare (De

In the Latin kingdoms of the East, and among the Armenians, who, curiously enough, adopted the customs of their fellow Christians from the West, it would seem that in both the noble and the roturier courts, in civil as well as in criminal cases, the plaintiff or prosecutor was not obliged personally to fight, but that if one of his witnesses offered battle, the defendant or accused was not permitted to decline the challenge under pain of losing his suit or being condemned. On the other hand, unless the complainant or accuser had a witness who was willing to offer battle, the oath of denial of the other party was sufficient, and in criminal cases the accuser was subjected to the *talio*.[1]

Formandis Libellis, 1535), there is no allusion to defect of evidence; it is a simple assertion of the guilt of the other side with a demand for the duel in case it is desired.—"Domine Judex, etc. Ego Petrus, etc. Quod Martinus hic præsens est falsus et proditor, qui perditionaliter rapuit mihi quendam equum pili mauri, stellatum in fronte, quod si ipse confiteatur peto ipsum condemnari super prædicta rapina ut raptorem. Si autem hoc neget ego per pugnam armis paribus sumtis a me et ab eo faciam eum confiteri palam per os suum in campo nobis per vos assignando, vel reddam eum victum vel mortuum in dicto campo. Et super dicta pugna pignus meum vel chyrothecas meas hic in medio in præsentia vestra offero et reddo, et promitto me juraturum in introitu campi per vos nobis ad certamen seu ad dictam pugnam assignandi quod ego non habeo herbas nec breves conjuratorias vel alia quæ maleficia vel fascinationes pariant vel parturiant quoquo modo. Et quod tunc Martinus juret similiter illud. Item et peto per vos Dominum judicem si Martinus prædictam rapinam neget declarari et judicari pugnam posse et debere esse et fieri ex prædicta causa inter me et eum et ipsum sententialiter condemnari ad subeundam pugnam mecum ex prædicta causa ut super prædicta rapina possit per pugnam veritas inveniri."—Eph. Gerhardi Tract. Jurid. de Judicio duellico, cap. 1, § 5 (Francof. 1735).

[1] Assises d'Antioche, Haute Cour, ch. ix. xi. xii; Assises des Bourgeois, ch. vi. vii. (Venise, 1876). This code, of which the existence has long been suspected, has recently been discovered in an Armenian version made by Sempad, the Constable of Armenia Minor, in 1265, for the use of his fellow countrymen. It has been published, with a French translation, by the Mehkitarist Society of St. Lazarus, and gives us the customary law of the Crusaders in an earlier form than the current texts of the Assises de Jerusalem.

By the English law of the thirteenth century, a man accused of crime had, in doubtful cases only, the right of election between trial by jury and the wager of battle. When a violent presumption existed against him, he was obliged to submit to the verdict of a jury; but in cases of suspected poisoning, as satisfactory evidence was deemed unattainable, the accused had only the choice between confession and the combat.[1] On the other hand, when the appellant demanded the duel, he was obliged to make out a probable case before it was granted.[2] When battle had been gaged, however, no withdrawal was permitted, and any composition between the parties to avoid it was punishable by fine and imprisonment[3] —a regulation, no doubt, intended to prevent pleaders from rashly undertaking it, and to obviate its abuse as a means of extortion. In accusations of treason, indeed, the royal consent alone could prevent the matter from being fought out.[4] Any bodily injury on the part of the plaintiff, tending to render him less capable of defence or aggression, likewise deprived the defendant of the right to the wager of battle, and this led to such nice distinctions that the loss of molar teeth was adjudged not to amount to disqualification, while the absence of incisors was considered sufficient excuse, be-

[1] Bracton. Lib. III. Tract. ii. cap. 18.—Fleta Lib. I. cap. xxxi. §§ 2, 3.

[2] Bracton. Lib. III. Tract. ii. cap. 23, § 1.

[3] Si autem uterque defaltam fecerit, et testatum sit quod concordati fuerunt, uterque capiatur, et ipsi et plegii sui in misericordia.—Ibid.

The custom with regard to this varied greatly according to local usage. Thus, a charter of the Count of Forez in 1270 concedes the right of avoiding battle, even at the last moment, by satisfying the adversary, and paying a fine of sixty sols.—Chart. Raynaldi Com. Forens. c. 4 (Bernard, Hist. du Forez, T. I. Preuves, p. 35). According to the customs of Lorris, in 1155, if a composition was effected after battle had been gaged and before security was given, each party paid a fine of two sous and a half. If after security was pledged, the fine was increased to seven sous and a half.—Chart. Ludov. Junior. ann. 1155, cap. xiv. (Isambert, Anciennes Lois Françaises, I. 155).

[4] Fleta Lib. II. cap. xxi. § 2.

cause they were held to be important weapons of offence.[1] Notwithstanding these various restrictions, cases of treason were almost always determined by the judicial duel, according to both Glanville and Bracton.[2] This was in direct opposition to the custom of Lombardy, where such cases were especially exempted from decision by the sword.[3] These restrictions of the English law, such as they were, did not, however, extend to the Scottish Marches, where the trial by battle was the universal resource and no proof by witnesses was admitted.[4]

In Bearn, the duel was permitted at the option of the accuser in cases of murder and treason, but in civil suits only in default of testimony.[5] That in such cases it was in common use is shown by a treaty made, in the latter part of the eleventh century, between Centulla I. of Bearn and the Viscount of Soule, in which all doubtful questions arising between their respective subjects are directed to be settled by the combat, with the singular proviso that the combatants shall be men who have never taken part in war.[6] In the thirteenth century, however, a provision occurs which must have greatly reduced the number of duels, as it imposed a fine of only sixteen sous on the party who made default, while, if vanquished, he was visited with a mulct of sixty sous and the forfeiture of his

[1] Bracton. Lib. III. Tract. ii. cap. 24 § 4.—"Hujusmodi vero dentes multum adjuvant ad devincendum."—Olivier de la Marche tells us (*Traités sur le Duel*, communicated to me by George Neilson, Esq.) that if the defendant had lost an eye the appellant must have one correspondingly bandaged. This device can scarce have been known in England, else it would have deprived Sir William Dalzell of the £200 forfeit adjudged to him by Richard II. when Sir Piers Courtenay refused to submit to the loss of an eye, to counterbalance that which Sir William had lost at Otterburn (Neilson, Trial by Combat, p. 237).

[2] Glanvil. Lib. XIV. cap. i.—Bracton. Lib. III. Tract. ii. cap. 3 § 1.

[3] Feudor. Lib. II. Tit. xxxix.

[4] Neilson, Trial by Combat, p. 128.

[5] For de Morlaas, Rubr. xxxviii. xxxix.

[6] Marca, Hist de Béarn. p. 293 (Mazure et Hatoulet).

arms.[1] In the neighboring region of Bigorre an exemption was allowed in favor of the widow whose husband had been slain in war. Until she remarried or her sons were of age to bear arms she was exempt from all legal process—a provision evidently intended to relieve her from the duel in which suits were liable to terminate.[2]

In some regions greater restrictions were imposed on the facility for such appeals to the sword. In Catalonia, for instance, the judge alone had the power of deciding whether they should be permitted,[3] and a similar right was reserved in doubtful cases to the podestà in a code of laws in force at Verona in 1228.[4] This must often have prevented the injustice inherent in the system, and an equally prudent reserve was exhibited in a statute of Montpellier, which required the assent of both parties.[5] On the other hand, in Normandy, at the commencement of the thirteenth century, many cases relating to real estate were examined in the first instance by a jury of twelve men, and, if they failed of an unanimous verdict, the question was decided by the duel, whether the parties were willing or not.[6]

By the criminal procedure in England, at about the same period, the duel was prescribed only for cases of felony or crimes of importance, and it was forbidden in trifling misdemeanors.[7] Appeal of battle could not lie between a vassal and his lord during the existence of the connection, nor between a serf and his master except in cases of treason.[8] It would also seem that the defendant could avoid the duel if he could prove that the motive of the appeal was hatred, for

[1] For de Morlaas, Rubr. iv.

[2] De Lagrèze, Hist. du Droit dans lès Pyrénées, Paris, 1867, p. 68.

[3] Libell. Catalan. MS. (Du Cange).

[4] Meo arbitrio determinabo duellum, vel judicium judicabo.—Lib. Juris Civil. Veronæ, cap. 78 (p. 63).

[5] Statut. Montispess. ann. 1204 (Du Cange).

[6] Établissements de Normandie, *passim* (Édition Marnier).

[7] Bracton. Lib. III. Tract. ii. cap. 19 § 6, cf. cap. 23 § 2.

[8] Ibid. cap. 20 § 5. Cf. Maitland, Select Pleas of the Crown, Vol. i. p. 43.

there is a curious case on record in which, when the appellant demanded battle, the accused offered to the king a silver mark for an impartial jury to decide this preliminary question, and it was granted to him.[1] In Southern Germany a fifteenth century MS. enumerates seven crimes for which the duel could be prescribed—detraction of the emperor or empire, treason, theft, robbery and depredation, rape, arson, and poisoning.[2]

From a very early period, a minimum limit of value was established, below which a pugnacious pleader was not allowed to put the life or limb of his adversary in jeopardy. This varied of course with the race and the period. Thus, among the Angli and Werini, the lowest sum for which the combat was permitted was two solidi,[3] while the Baioarians established the limit at the value of a cow.[4] In the tenth century, Otho II. decided that six solidi should be the smallest sum worth fighting for.[5] The so-called laws of Henry I. of England decreed that in civil cases the appeal of battle should not lie for an amount less than ten solidi.[6] In France, Louis le Jeune, by an edict of 1168, forbade the duel when the sum in debate was less than five sous,[7] and this remained in force

[1] Maitland, p. 48—"Utrum verum sit appellum vel athia" (hate).

[2] Würdinger, Beiträge zur Geschichte des Kampfrechtes in Bayern, p. 7.

[3] L. Anglior. et. Werinor. Tit. xv. The variations in the coinage are so numerous and uncertain, that to express the values of the solidus or sou, at the different periods and among the different races enumerated, is virtually impossible. In general terms, it may be remarked that the Carlovingian solidus was the twentieth part of a pound of silver, and according to the researches of Guérard was equivalent in purchasing power to about thirty-six francs of modern money. The marc was half a pound of silver.

[4] L. Baioar. Tit. VIII. cap. ii. § 5; cap. iii.

[5] L. Longobard, Lib. ii. cap. lv. § 37.

[6] L. Henrici I. cap. 59.

[7] Isambert, Anciennes Lois Françaises, I. 162. This occurs in an edict abolishing sundry vicious customs of the town of Orleans. It was probably merely a local regulation, though it has been frequently cited as a general law.

for at least a century.[1] The custom of Normandy in the thirteenth century specifies ten sous as the line of demarcation between the *lex apparens* and the *lex simplex* in civil suits,[2] and the same provision retains its place in the Coutumier in use until the sixteenth century.[3] In the Latin States of the East founded by the Crusaders, the minimum was a silver marc in cases of both nobles and roturiers.[4] A law of Aragon, in 1247, places the limit at ten sous.[5]

As regards the inferior classes of society, innumerable documents attest the right of peasants to decide their quarrels by the ordeal of battle. By the old Lombard law, slaves were allowed to defend themselves in this manner;[6] and they could even employ the duel to claim their liberty from their masters, as we may infer from a law of King Grimoald denying this privilege to those who could be proved to have served the same master for thirty continuous years.[7] Similarly, among the Frisians, a *litus* claiming his liberty was allowed to prove it against his master with arms.[8] The institutions of feudalism widened the distance between the different classes of society, and we have already seen that, in the thirteenth century, serfs

[1] Livres de Jostice et de Plet, Liv. XIX. Tit. xvii. § 3, Tit. xxii. § 4, Tit. xxxviii. § 3. See also a coutumier of Anjou of the same period (Anciens Usages d'Anjou, § 32—Marnier, Paris, 1853).

The "Livre de Jostice et de Plet" was the production of an Orléannais, which may account for his affixing the limit prescribed by the edict of Louis le Jeune. The matter was evidently regulated by local custom, since, as we have already seen, his contemporary, Beaumanoir (cap. lxiii. § 11), names twelve deniers, or one sou, as the minimum.

[2] Cod. Leg. Norman. P. II. cap. xxi. § 7 (Ludewig, Reliq. MSS. VII. 307). The judgment of God was frequently styled *Lex apparens* or *paribilis*.

[3] Anc. Coutum. de Normandie, cap. 87 (Bourdot de Richebourg, IV. 55).

[4] Assises de Jerusalem, cap. 149.—Assises d'Antioche, Haute Cour. ch. ix.; Assises des Bourgeois, ch. vi.

[5] Laws of Huescar, by Don Jayme I. (Du Cange. s. v. *Torna*).

[6] L. Longobard. Lib. I. Tit. XXV. § 49.

[7] Ibid. Lib. I. Tit. IX. § 38.

[8] L. Frision. Tit. XI. cap. iii.

were enfranchised in order to enable them to support their testimony by the combat; yet this was only the result of inequality of rank. In the time of Beaumanoir (1283), though an appeal would not lie from a serf to a freeman, it may be safely inferred from the context that a combat could be legally decreed between two serfs if the consent of their masters were obtained,[1] and other contempotary authorities show that a man claimed as a serf could defend his freedom with the sword against his would-be master.[2] Even Jews were held liable to the appeal of battle, as we learn from a decision of 1207, preserved in an ancient register of assizes in Normandy,[3] and they no doubt purchased the exemption, which was granted to them, except in cases of flagrant murder, by Philippe le Long, as a special favor, in 1317.[4]

Difference of condition thus became an impediment to the duel, and formed the subject of many regulations, varying with circumstance and locality. The free mountaineers of Béarn, as has been seen, placed the prince and the subject on an equality before the law, but this was a rare example of independence, and the privileges of station were sometimes exhibited in their most odious form. In France, for instance, while the battle trial could take place between the gentilhomme and the *vilain*, the former was secured by the distinction that if the villein presumed to challenge him, he enjoyed the right of fighting on horseback with knightly weapons, while the challenger was on foot and armed only with shield and staff;

[1] Coutumes du Beauvoisis, cap. lxiii. § 1.—The consent of the master was necessary to authorize the risk of loss which he incurred by his serf venturing to engage in the duel. Thus, in a curious case which occurred in 1293, "idem Droetus corpus suum ad duellum in quo perire posset obligare non poterat sine nostra licentia speciali."—Actes du Parlement de Paris, I. 446.

[2] Livres de Jostice et de Plet, Liv. XIX. Tit. 13.—Tabul. Vindocinens. cap. 159 (Du Cange. s. v. *adramire*).

[3] Assises de l'Echiquier de Normandie, p. 174 (Marnier).

[4] Laurière, Table Chron. des Ordonnances, p. 105.

but if the gentleman condescended to challenge the villein, they met on equal terms.[1] This last regulation was enforced with impartial justice, for Beaumanoir mentions a case in which a gentleman challenged a roturier, and presented himself in the lists mounted and armed with his knightly weapons. The defendant protested against this illegal advantage, and the judges decided that the gentleman had forfeited his horse and arms, and that if he desired to continue the combat he must do so in the condition in which he was left by the disarmament—in his shirt without armor or weapons, while his adversary should retain coat of mail, target, and club.[2] The barbarous injustice of the general rule, moreover, was by no means of universal application. Pierre de Fontaines, for instance, directs that in cases of appeal from a roturier to a gentleman the combat shall take place on foot between champions;[3] and I find a case recorded in 1280, in which a *femme de corps* of Aimeri de Rochechouart accused the Sire de Montricher of burning her houses, and as the duel was adjudged she placed in the lists an armed and mounted knight as her champion, to whom no objection seems to have been made.[4]

Throughout both Northern and Southern Germany, where the minute distinctions of birth were guarded with the most jealous care from a very early period, the codes of the thirteenth century, including even the burgher laws, provided that a difference of rank permitted the superior to decline the challenge of an inferior, while the latter was obliged to accept the appeal of the former. So thoroughly was this principle carried into practice, that, to compel the appearance of a *Semperfri*, or noble of sixteen quarterings, the appellant was

[1] Beaumanoir, op. cit. cap. lxi. §§ 9, 10.—Établissements de S. Louis, Liv. I. chap. lxxxii.

[2] Beaumanoir, cap. lxiv. § 3.

[3] Conseil, ch. XXI. Tit. xiv.

[4] Actes du Parlement de Paris, T. I. No. 2269 A. p. 217.

required to prove himself of equally untarnished descent.[1] In the same spirit a Jew could not decline the appeal of battle offered by a Christian accuser, though we may safely infer that the Jew could not challenge the Christian.[2] So, in the Latin kingdom of Jerusalem, the Greek, the Syrian, and the Saracen could not challenge the Frank, but could not, in criminal cases, decline his challenge, though they might do so in civil suits.[3] In Aragon, no judicial duel was permitted between a Christian and a Jew or a Saracen,[4] while in Castile both combatants had to be gentlemen, quarrels between parties of different ranks being settled by the courts.[5] On the other hand, in Wales, extreme difference of rank was held to render the duel necessary, as in cases of treason against a lord, for there the lord was plaintiff against his vassal, and as no man could enter into law with his lord, the combat was considered the only mode of prosecution befitting his dignity.[6]

[1] Jur. Provin. Saxon. Lib. I. c. 50, 62. Lib. III. c. 29, 65.—Sachsische Weichbild xxxiii. xxxv. Jur. Provin. Alamann. cap. ccclxxxv. §§ 14, 15 (Ed. Schilteri). According to some MSS. of the latter, however, this privilege of declining the challenge of an inferior was not allowed in cases of homicide.—"Ibi enim corpus corpori opponitur"—cap. liii. § 4 (Ed. Senckenberg). On the other hand, a constitution of Frederic Barbarossa, issued in 1168 and quoted above, forbids the duel in capital cases unless the adversaries are of equal birth.

Tallhöfer's Kamp-recht lays down the rule unconditionally—"Item ist das ain man kempflich angesprochen wirt von ainem der nit als gut is als er, dem mag er mit recht ussgan ob er wil . . . . sprict aber der edler den mindern an zu kempfen so mag der der minder nich absyn."—Dreyer, *op. cit.* p. 166.

[2] Jur. Prov. Alamann. cap. cclviii. § 20. (Ed. Schilter.)—We have already seen that the converse of this rule was introduced in England, as regards questions between Frenchmen and Englishmen, by William the Conqueror.

[3] Quia surien et greci in omnibus suis causis, præter quam in criminalibus excusantur a duello.—Assises de Jerusalem, Baisse Court, cap. 269.

[4] Laws of Huescar, ann. 1247 (Du Cange s. v. *Torna*).

[5] Las Siete Partidas, P. VII. Tit. iii. l. 3.

[6] Anomalous Laws, Book XIV. chap. xiv. § 1 (Owen II. 625).

A question of this nature was the remote occasion of the murder of Charles the Good, Count of Flanders, in 1127. Bertulf, Provost of the church of Bruges, was rich and powerful, although in reality his family were villeins of the count. He married his nieces to knights, one of whom, in presence of the count, appealed another knight to battle. The appellee refused on the ground that he was not obliged to notice the challenge of a villein, for according to the law of the land a freeman marrying a serf was reduced to the latter condition after the expiration of a year. The count's attention being thus called to his rights over the family of Bertulf, he proceeded to establish them, when Bertulf set on foot the conspiracy which ended in the assassination of the count.[1]

There were three classes—women, ecclesiastics, and those suffering under physical incapacity—with whom personal appearance in the lists would appear to be impossible. When interested in cases involving the judicial duel they were therefore allowed the privilege of substituting a champion, who took their place and did battle for the justice of their cause. So careful were legislators to prevent any failure in the procedure prescribed by custom, that the North German law provided that the dead when prosecuted could appear in the lists by substitutes,[2] and the Assises de Jerusalem ordered the suzerain to supply the expenses for forty days, when a suitor unable to fight was also too poor to pay for a champion to take his place; and when a murdered man left no relatives to prosecute the murderer, the suzerain was likewise obliged to furnish the champion in any trial that might arise.[3] Equally directed to the same purpose was the German law which provided that when a crippled defendant refused or neglected to procure a substitute, the judge was to seize one-half of his property with which to pay the services of a gladiator, who

[1] Galberti Vit. Caroli Boni, cap. 2, n. 12.

[2] Jur. Provin. Saxon. Lib. I. art. 48.

[3] Assises de Jerusalem, cap. 266, 267.

could claim nothing more.[1] Guardians of women and minors, moreover, were bound to furnish battle in their behalf.[2]

Women, however, did not always restrict themselves to fighting thus vicariously. The German laws refer to cases in which a woman might demand justice of a man personally in the lists, and not only are instances on record in which this was done, as in a case at Berne in 1228, in which the woman was the victor,[3] but it was of sufficiently frequent occurrence to have an established mode of procedure, which is preserved to us in all its details by illuminated MSS. of the period.[4] The chances between such unequal adversaries were adjusted by placing the man up to the navel in a pit three feet wide, tying his left hand behind his back, and arming him only with a club, while his fair opponent had the free use of her limbs and was furnished with a stone as large as the fist, or weighing from one to five pounds, fastened in a piece of stuff. A curious regulation provided the man with three clubs. If in delivering a blow he touched the earth with hand or arm he forfeited one of the clubs; if this happened thrice his last weapon was gone, he was adjudged defeated, and the woman could order his execution. On the other hand, the woman was similarly furnished with three weapons. If she struck the man while he was disarmed she forfeited one, and with the loss of the third she was at his mercy, and was liable to be buried alive. According to the customs of Freisingen these combats were reserved for accusations of rape. If the man was vanquished, he was beheaded; if the woman, she only lost a hand, for the reason that the chances of the fight were against her.[5] In Bohemia, also, women over the age of eighteen

[1] Jur. Provin. Alamann. cap. lx. § 5.

[2] Jur. Provin. Saxon. Lib. I. c. 42, 43.

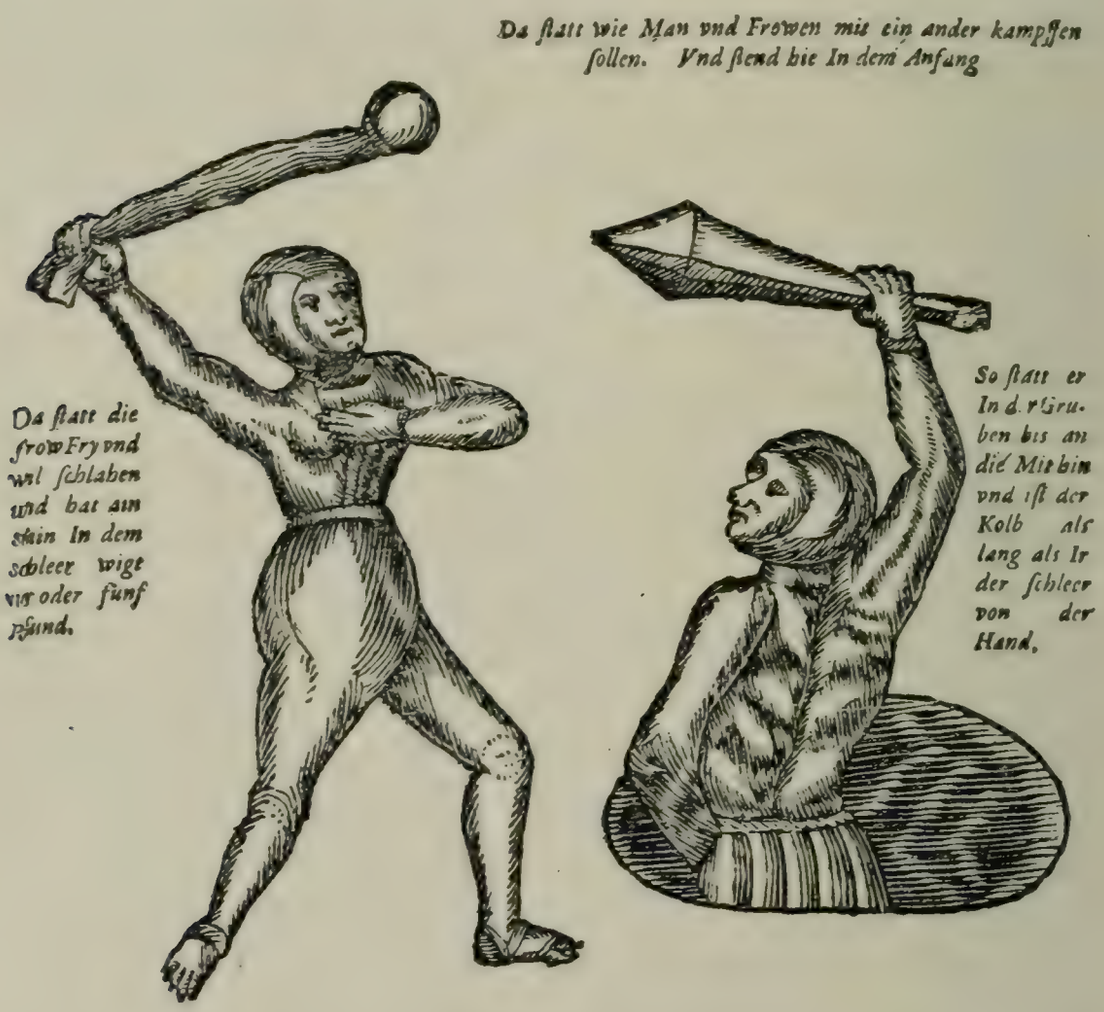
[3] Belitz de Duellis Germanorum, p. 9 (Vitembergæ, 1717).

[4] Jur. Provin. Alamann. cap. ccxxix. § 2. This chapter is omitted in the French version of the Speculum Suevicum.

[5] Ephr. Gerhardi Tract. Jurid. de Judic. Duellico, cap. iii. § 7, et Mantissa.—Dreyer, Anmerckung von den Quellgesetzen, p. 160.—Meyer, Der

had the privilege of the duel; the man was put into a pit as deep as his waist; the woman was armed with sword and buckler, but was not allowed to approach nearer than a circle traced around the mouth of the pit.[1]

Gerichtliche Zweikampf, 1873. Gerhardt gives from a MS. of the fifteenth century in the Grand-ducal Library of Saxe-Gotha a rude representation of the first stage of one of these combats, which is here reduced in facsimile. A MS. at Wolfenbüttel has a miniature virtually the same. In another repre-



sentation of these combats, the antagonists are furnished with curved knives (Würdinger, Beiträge, p. 18).

In many places, however, crimes which a man was forced to disprove by combat were subject to the ordeal of hot iron or water when the accused was a woman. Thus, by the Spanish law of the thirteenth century, "Muger . . salvese por fierro caliente; e si varon fuere legador . . salvese por lid"—Fuero de Baeça (Villadiego, Fuero Juzgo fol. 317[a]).

[1] Patetta, Le Ordalie, p. 159.

The liability of ecclesiastics to the duel varied with the varying relations between the church and state. As early as the year 819, Louis le Débonnaire, in his additions to the Salic law, directs that, in doubtful cases arising between laymen and ecclesiastics, the duel between chosen witnesses shall be employed, but that when both parties are clerical it shall be forbidden.[1] This restriction was not long observed. A decree of the Emperor Guy, in 892, gives to churchmen the privilege of settling their quarrels either by combat or by witnesses, as they might prefer;[2] and, about the year 945, Atto of Vercelli complains that the tribunals allowed to ecclesiastics no exemption from the prevailing custom.[3] As we have seen (p. 131), Otho II., at the Council of Verona in 983, subjected the churches to the law of the duel, only granting them the privilege of employing champions. Some intricate questions involved in the coexistence of the Lombard and the Roman law arose in a celebrated case between the Abbey of Farfa and that of SS. Cosmo and Damianus of Rome, which was pleaded in 998 and 999 before Otho III. and Popes Gregory V. and Sylvester II. The Abbey of Farfa proved that it lived under the Lombard law, while the other was under the Roman law. It was decided, as the Abbey of Farfa desired, that after hearing testimony the case should be settled by the duel, but the witnesses of the Roman abbey were so manifestly perjured that it was held not to have made out a case justifying an appeal to the combat, and the churches in dispute were adjudged to Farfa.[4]

So far was this liability to the duel from being deemed a hardship by the turbulent spirits of the period, that clerks not infrequently disdained to sustain their rights by the interven-

[1] Capit. Ludov. Pii I. ann. 819, cap. X.

[2] Ughelli, T. II. p. 122 (Du Cange).

[3] Addunt insuper, quoniam si aliquis militum sacerdotes Dei in crimine pulsaverit per pugnam sive singulari certamine esse decernendum.—De Pressuris Eccles.

[4] Muratori Script. Rer. Ital. II. II. 499, 505.

tion of a champion, and boldly entered the lists themselves. In 1080 the Synod of Lillebonne adopted a canon punishing by a fine such belligerent churchmen as indulged in the luxury of duels without having first obtained from their bishops a special license authorizing it.[1] About the same period, Geoffrey, Abbot of Vendôme, in a letter to the Bishop of Saintes, complains of one of his monks who had fought in a judicial duel with a clerk of Saintes[2]. The practice continued, and though forbidden by Pope Innocent II. in 1140,[3] Alexander III. and Clement III. found it necessary to repeat the prohibition before the close of the century.[4] Yet Alexander, when appealed to with respect to a priest of the Campagna who had lost a finger in a duel, decided that neither the offence nor the mutilation debarred him from the exercise of his sacerdotal functions, and only directed him to undergo due penance.[5] The progress of the age, however, was shown when, about thirty years afterwards, Celestin III. pronounced sentence of deposition in a similar case submitted to him;[6] and this was formally and peremptorily confirmed by Innocent III. at the great council of Lateran in 1215.[7]

That the peaceful ministers of Christ should vindicate their rights with the sword, either personally or by proxy, was a sacrilege abhorrent to pious minds. As early as the middle of the ninth century, Nicholas I., who did so much to establish the supremacy of the church, endeavored to emancipate it from this necessity, and declared that the duel was not recognized by ecclesiastical law.[8] The utmost privilege which the

[1] Clericus . . . si duellum sine episcopi licentia susceperit . . . aut assultum fecerit, episcopis per pecuniam emendetur.—Orderic. Vital. P. II. Lib. V. c. 5.

[2] Goffrid. Vindocinens. Lib. III. Epist. 39. [3] Du Cange.

[4] Ut clerici non pugnent in duello, nec pro se pugiles introducent.—Chron. S. Ægid. in Brunswig.—C. 1. Extra, Lib. V. Tit. xiv.

[5] C. 1. Extra, Lib. I. Tit. xx.

[6] C. 2 Extra, Lib. V. Tit. xiv.

[7] Council. Lateran. IV. can. 18.

[8] C. 22 Decret. caus. II. q. v.—Nicolai PP. I. Epist. 148.

secular law accorded the clergy, however, was the right of presenting a champion in the lists, which zealous churchmen naturally resented as an arbitrary injustice.[1] How thoroughly it was carried out in practice, notwithstanding all remonstrances, is shown by a charter granted in 1024 by St. Stephen of Hungary to the monastery of St. Adrian of Zala, by which, among other privileges, the pious king bound himself to supply a champion in all suits against the abbey, in order that the holy meditations of the monks might not be interrupted.[2] Not long after, in 1033, the celebrated abbey of St. Clement at Pescara was involved in a dispute concerning some lands which had been cut off from its possessions by a change in the course of the river Pescara, and had been seized by the lords of the contiguous territory. At an assembly of the magnates of the district it was adjudged that the matter must be settled by the duel. The night before the combat was to take place the holy abbot Guido, after enjoining earnest prayers by all the monks, sallied forth alone to the banks of the stream and stretching forth his staff adjured the waters to repair the evil which they had wrought under the impulsion of the devil. The river forthwith returned to its old channel, and next morning the multitude which assembled to witness the combat were astounded to see the miracle. The godless men who had seized on the possessions of the church humbly sought pardon for their sin, and the abbey remained in quiet enjoyment of its rights.[3]

The scandal of maintaining the claims of the church by carnal weapons and bloodshed was not soon suppressed. In 1112 we find a certain Guillaume Maumarel, in a dispute with the chapter of Paris concerning some feudal rights over the domain of Sucy, appearing in the court of the Bishop of Paris for the purpose of settling the question by the duel, and

[1] Atton. Vercell. De Pressuris Eccles. Pt. I.

[2] Chart. S. Stephani (Batthyani Legg. Eccles. Hung. T. I. p. 384).

[3] Chron. Piscariens. Lib. II. (D'Achery, II. 951).

though the matter was finally compromised without combat, there does not seem to have been anything irregular in his proceeding.[1] So, about the same period, in a case between the abbey of St. Aubin in Anjou and a neighboring knight, involving some rights of property, the monks not only challenged their adversary, but the duel was held in the seignorial court of another monastery;[2] and in 1164, we find a duel decreed at Monza, by the Archbishop of Cologne as chancellor of Italy, between an abbey and a layman of the vicinity.[3] That such cases, indeed, were by no means uncommon is shown by their special prohibition in 1195 by Celestin III.[4] Yet, notwithstanding the repeated efforts of the Holy See, it was almost impossible for the church to exempt itself from the universal liability. Though in 1174 Louis VII. granted a special privilege of exemption to the church of Jusiers and its men, on the ground that he was bound to abrogate all improper customs,[5] still no general reform appears to have been practicable. An important step was gained when in 1176 Henry II., as a concession to the papacy, agreed that ecclesiastics should not be forced to the duel,[6] but this did not extend to the Scottish Marches, where by law an ecclesiastic was as liable as a layman to personal appearance in the lists; if he presented a champion he was held in custody till the event of the duel, when, if the champion was defeated, his principal was promptly beheaded. Innocent III. sternly prohibited this in 1216, but ineffectually, as is seen by a complaint of the English clergy, in 1237, in which they mention the case of the Prior of Lide, who had thus recently suffered the penalty. This was equally fruitless, for the *Leges Marchiarum*, enacted in 1249, declare

[1] Cartulaire de l'Église de Paris, I. 378.

[2] The charter recording the suit and its results is given by Baluze and Mansi, Miscell. III. 59.

[3] Ibid. p. 134.

[4] C. 1 Extra, Lib. v. Tit. xxxv.

[5] Du Boys, Droit Criminel des Peuples Modernes, II. 187.

[6] Matt. Paris Hist. Angl. ann. 1176 (Ed. 1644, p. 92).

that exemption from battle is confined to the persons of the kings and of the Bishops of St. Andrews and Durham.[1]

In France, during the thirteenth century, the liability continued. In 1239 a knight of Orleans, Gui de Santillac, testified before the royal council that the chapter of Saint-Aignan had appealed him in wager of battle.[2] As late as the year 1245, some vassals of the chapter of Nôtre Dame at Paris denied the service due by them, and demanded that the claim of the chapter should be made good by the wager of battle. That they had a legal right to do so is shown by the fact that the churchmen were obliged to implore the intervention of the pope; and Innocent IV. accordingly granted to the chapter a special privilege, in which, on the ground that single combats were forbidden by the canons, he declared that the church of Nôtre Dame should be entitled to prove its rights by witnesses, deeds, and other legitimate proofs, notwithstanding the custom existing to the contrary.[3] It was probably his interference in this case that led him a few years later, in 1252, to issue a decretal in which he pointed out the manifest hardship of forcing the clergy in France, when prosecuting such claims against their serfs, to have recourse to the duel, and thus, under the canon law, to forfeit their positions. To remedy this he proclaimed as a general rule that all verdicts should be void when obtained against clerks either by means of the duel or through reason of their refusing the combat;[4] yet in the following year he was obliged to intervene to protect the Archbishop of Sens, who complained that in these cases he was obliged to make good his claims by battle.[5] In this, Innocent was consistent, for one of the accusations which he had brought against the Emperor Frederic II. when the latter was deposed

[1] Neilson, Trial by Combat, pp. 122–7.

[2] Actes du Parlement de Paris, T. I. p. cccvii.

[3] Contraria consuetudine non obstante.—Cart. de l'Église de Paris, II. 393–4.

[4] Archives Administratives de Reims, T. I. p. 733.

[5] Berger, Registres d'Innocent IV. n. 6184 (T. III. p. 148).

at the Council of Lyons in 1245 was that he had forced ecclesiastics to undergo the duel, to the confusion of all distinctions between clerk and layman.[1] Even in Italy about 1220 the podestà of Florence ordered the duel to decide a suit concerning certain property between some citizens and the church of the Apostles; the latter invoked the intervention of Honorius III., who commanded the matter to be settled by regular judicial process, boldly alleging that the duel was unheard of in such matters,[2] but in spite of this and the repeated prohibitions of the popes, trial by combat was still towards the close of the thirteenth century regarded as the only mode of settling disputed questions between churches when the genuineness of a charter was impugned.[3] Yet at the same period the doctors of canon law held that an ecclesiastic appearing in the lists, either personally or by a champion, was subject to deposition; it was better, they said, to lose lands and fiefs than to incur mortal sin. Unfortunately this was scarce more than a mere *brutum fulmen*, for a dispensation could always be had from bishop or pope.[4] Custom was stubborn, moreover, and half a century later, when the judicial duel was going out of fashion, a bishop of Liége so vexed the burghers of Louvain, by repeated citations to the combat to settle disputed questions, that John III. Duke of Brabant was obliged to appeal to the Emperor Charles IV., who accordingly wrote to the bishops of Trèves, Cambrai, and Verdun desiring them to find some means of putting an end to the bellicose tendencies of their episcopal brother.[5]

These sporadic cases only show how difficult it was through-

[1] Harduin. Concil. VII. 384.

[2] Compilat. V. Lib. v. Tit. vii. (Ed. Friedberg, p. 184). "Rem hactenus inauditam et tam juri scripto quam æquitati contrariam."

[3] Fit pugna si ecclesia contra ecclesiam habet controversiam vel contra privatum et instrumentum dicatur falsum.—Odofredi Summa de Pugna (Patetta, p. 483).

[4] Joh. Friburgens. Summæ Confessorum Lib. II. Tit. iii. Q. 3, 5, 6.—Cf. Baptist. de Saulis Summam Rosellam s. v. *Dispensatio*, § 7.

[5] Proost, Législation des Jugements de Dieu, p. 19.

out the whole extent of Christendom to eradicate a custom so deeply rooted in ancestral modes of thought. By the middle of the thirteenth century the church had succeeded in virtually establishing the claim, for which it had long striven, that ecclesiastics were not subject to secular law in either civil or criminal matters. This exemption of course released them from liability to the duel and placed them exclusively under spiritual jurisdiction, in which the strongly marked papal aversion to the duel had full opportunity of making itself effective.[1]

Another phase of the relations between the church and the duel is to be seen in the extensive secular jurisdiction of its prelates in their capacity as temporal seigneurs. In this they were accustomed to award the duel as freely as any other form of legal procedure. To do this was not only one of the privileges which marked the feudal superior, but was also a source of revenue from the fees and penalties thence accruing, and these rights were as eagerly sought and as jealously guarded by the spiritual lords as by the warlike barons. It would scarce be necessary to multiply instances, but I may mention a charter granted by Fulk Nera, Count of Anjou, about the year 1010, bestowing these rights on the abbey of Beaulieu in Touraine,[2] and one by the Emperor Henry III., in 1052, to the bishop and church of Volterra in Italy.[3] The

[1] It is not easy to understand the remark of Olivier de la Marche, in the latter half of the fifteenth century (Traités du Duel Judiciaire, p. 44, communicated to me by George Neilson, Esq.), warning judges that they cannot condemn clerks to the duel except in cases of *lèse majesté* and those affecting the faith. At that time the faith was exclusively in the hands of the Inquisition, and the canons admit of no exception to clerical immunity in cases of treason. In both matters torture had long before proved itself vastly more efficient than the clumsy and doubtful ordeals.

[2] Du Cange, s. v. *Bellum.*

[3] Muratori, Antiq. Ital. Dissert. 39.—Among various other examples given by the same author is one of the year 1010, in which the court of the bishop of Aretino grants the combat to decide a case between a monastery and a layman.

first authentic evidence of the existence of the battle trial in Scotland is a charter of Alexander I. in 1124 to the Abbey of Scone, in which he bestows on the abbot and monks the right to grant the duel and ordeal in their jurisdiction; and his brother, St. David I., conferred the same rights on the Abbey of Holyrood.[1] Some conscientious churchmen objected to a practice so antagonistic to all the teachings of the religion of which they were professors, and lifted up their voices to check the abuse. Thus, about the close of the eleventh century, we find the celebrated canonist, St. Ivo of Chartres, rebuking the Bishop of Orleans for ordering the combat to decide an important suit in his court.[2] Ivo even carried out his principles to the sacrifice of the jurisdiction usually so dear to the prelates of his day, for in another case he refused to give judgment because it necessarily involved a trial by battle, and he eluded the responsibility by transferring the cause to the court of the Countess of Chartres.[3] A century later Peter Cantor declared that as a priest he would in no case furnish relics on which the preliminary oaths were to be taken, for churchmen were prohibited from being concerned in bloodshed.[4] These precepts and examples were equally unavailing. Churchmen continued to award the wager of battle, and resolutely resisted any invasion of their privileges. In 1150 the statutes of the chapter of Lausanne direct that all duels shall be fought before the provost—and the provost was Arducius, Bishop of Geneva.[5] In 1201 we see the Abbot of St. Alban's and the Abbot of Westminster pleading as to their rights over the manor of Aldenham, including that of the duel.[6] Even in the thirteenth century, in the archbishop's court or officiality of Reims, the duel was a matter of course;[7] and a case is recorded, occur-

[1] Neilson, Trial by Combat, pp. 76, 81.

[2] Ivon. Epist. cxlviii.

[3] Ivon. Epist. ccxlvii.

[4] Pet. Cantor. Verb. Abbreviat. cap. lxxviii.

[5] Migne's Patrologia, T. 188, p. 1287.

[6] Baildon, Select Civil Pleas, I. 43.

[7] Lib. Pract. de Consuetud. Remens. *passim* (Archives Législatives de Reims).

ring in 1224, in a dispute about the ownership of a house, which was decided by a duel in the court of the abbey of St. Remy, where the abbot presided over the lists and they were guarded by the royal officials.[1] In 1239 the Bishop of Orleans contested with the king as to the right of the former to the jurisdiction of the duel in his diocese;[2] and in a judgment rendered in 1269, concerning a combat waged within the limits of the chapter of Nôtre Dame of Paris, we find that the first blows of the fight, usually known as *ictus regis* or *les cous lou roi*, are alluded to as *ictus capituli*.[3] How eagerly these rights were maintained is apparent from numerous decisions concerning contested cases. Thus, an agreement of 1193, between the Countess of St. Quentin and the chapter of Nôtre Dame, respecting the disputed jurisdiction of the town of Viry, gives the official of the chapter the right to decree duels, but places the lists under the supervision of both parties, and divides the spoils equally between each.[4] A charter of 1199, concerning the village of Marne, shows that the sergeant, or officer of the chapter, had the cognizance of causes up to the gaging of battle, after which further proceedings were reserved for the court of the bishop himself.[5] In 1219 the commune of Novara arrogated to itself the right of decreeing the duel, but the bishop resisted this invasion of his privileges, and on the matter being referred for arbitration to the Bishop of Turin he decided in favor of his episcopal brother. The Bishop of Modena had a long and expensive suit with his city on the same question, which ended in 1227

[1] Archives Adminst. de Reims, T. I. p. 822.

[2] Actes du Parlement de Paris, T. I. p. cccvii.

[3] Cartulaire de l'Église de Paris, III. 433. After the first blows the parties could be separated on payment of a fine to the court, from the recipient of which the name is evidently derived. Apparently the good canons drew a distinction between awarding the duel and engaging in it, for we have already seen (p. 159) that twenty-four years before they had obtained from Innocent IV. a special privilege exempting them from the necessity of maintaining their rights by battle.

[4] Cartulaire de l'Église de Paris, I. 234.

[5] Ibid. I. 79–80.

with a compromise by which he abandoned the right; the Bishops of Vercelli were more fortunate, for they maintained it until the beginning of the fourteenth century, when judicial duels were going out of fashion.[1] In 1257, while St. Louis was exerting himself with so much energy to restrict the custom, an abbey is found engaged in a suit with the crown to prove its rights to decree the duel, and to enjoy the fees and mulcts thence arising;[2] and in 1277 a similar suit on the part of the abbey of St. Vaast d'Arras was decided in its favor.[3] From a verdict given in 1293, the right of the chapter of Soissons to decree the judicial combat appears to be undoubted, as well as the earnestness of the worthy ecclesiastics to exercise the privilege.[4] Even more significant is a declaration of the authorities of Metz, as late as 1299, by which the granting of all wagers of battle is expressly admitted by the civil magistrates of the city to appertain to the court of the archbishop;[5] and even in 1311 a bishop of St. Brieuc ordered a duel between two squires pleading in his court, in consequence of high words between them. From some cause the combat did not take place, and the Christian prelate seized the arms and horses of the parties as his mulct. They appealed to the Parlement of Paris, which ordered the restoration of the confiscated articles, and fined the bishop for his disregard of the royal edicts prohibiting the single combat.[6] Not long before, Beaumanoir had definitely asserted that the church could not be concerned in cases which involved the judicial duel, or the infliction of death or mutilation;[7] but the church was not disposed to admit this limitation on its jurisdiction, and in spite of the attempted suppression of the wager of battle by the

[1] Patetta, Le Ordalie, p. 437.

[2] Les Olim, I. 24.

[3] Actes du Parl. de Paris. T. I. No. 2122, C. p. 197.

[4] Actes du Parl. de Paris, T. I. p. 446.

[5] Du Cange, s. v. *Arramiatio.*

[6] Les Olim, III. 679.

[7] Voirs est que tuit li cas où il pot avoir gages de bataille ou peril de perdre vie ou membre, doivent estre justicié par le laie justice; ne ne s'en doit sainte Église meller.—Coutumes du Beauvoisis, cap. xi. art. 30.

crown it continued in its multifarious capacity of seigneur to execute the cruel laws of the period with undiminished activity.[1]

In other lands, where the duel had not experienced as in France the hostility of the supreme power, prelates continued to decree it, regardless of the papal anathemas. It was to no purpose that canon lawyers proved that they thereby incurred mortal sin, and that if death ensued they became "irregular" and incompetent to perform divine service. To all this they turned a deaf ear, and John of Freiburg, towards the close of the thirteenth century, is reduced to wishing that preachers would expound these principles in the pulpit and make them understood by the people at large.[2]

There was one jurisdiction which held itself more carefully aloof from the prevailing influence of barbarism—that of the Admiralty Courts, which covered a large portion of practical mercantile law. This is a fact easily explicable, not only from the character of the parties and of the transactions for which those courts were erected, but from the direct descent of the maritime codes from the Roman law, less modified by transmission than any other portions of mediæval jurisprudence. These codes, though compiled at a period when the wager of battle flourished in full luxuriance, have no reference to it whatever, and the Assises de Jerusalem expressly allude to the Admiralty Courts as not admitting the judicial duel in proof,[3] while an English document of 12 Edward III. attests the same principle.[4] When, however, the case was one implying an accusation of theft or deception, as in denying the receipt of cargo, the matter entered into the province of criminal law, and the battle trial might be legitimately ordered.[5]

[1] See the Registre Criminel de la Justice de St. Martin-des-Champs (Paris, 1877).

[2] Joh. Friburgens. Summæ Confessorum Lib. II. Tit. iii. Q. 5.

[3] En la cort de la mer na point de bataille por prueve ne por demande de celuy veage.—Assises de Jerusalem, cap. xliii.

[4] Pardessus, Us et Coutumes de la Mer.

[5] Livres de Jostice et de Plet, Liv. VII. Tit. iv. § 2.

CHAPTER VI.

REGULATIONS OF THE JUDICIAL COMBAT.

The forms and ceremonies employed in the judicial duel may furnish an interesting subject of investigation for the admirers of chivalry, but they teach in their details little concerning the habits and modes of thought of the Middle Ages, and for the most part are therefore interesting only to the pure archæologist. Although minute directions have come down to us in the manuals compiled for the guidance of judges of the lists, to enumerate them in their varying fashions would hardly be worth the necessary space. Yet there are some details which are of interest as illustrating both the theory and practice of the duel in its legal aspect. Thus the general principle on which the combat was conducted was the absolute assertion by each party of the justice of his cause, confirmed by a solemn oath on the Gospels, or on a relic of approved sanctity, before the conflict commenced.[1] Defeat was thus not

[1] According to Bracton, the appellant in criminal cases appears always obliged to swear to his own personal knowledge, *visu ac auditu*, of the crime alleged. This, however, was not the case elsewhere. Among the glossators on the Lombard law there were warm disputes as to the propriety, in certain cases, of forcing one of the contestants to commit perjury. The matter will be found treated at some length in Savigny's Geschichte d. Rom. Recht. B. IV. pp. 159 sqq. Cf. Odofredi Summa de Pugna (Patetta, pp. 485–7).

The formula of the oath as given in the Fleta is as follows: The parties take each other by the hand and first the appellee swears, "Hoc audis, homo quem per manum teneo, qui A. te facis appellari per nomen baptismi tui, quod ego C. fratrem tuum, vel alium parentem vel dominum non occidi, vel plagam ei feci ullo genere armorum per quod remotior esse debuit a vita et morti propinquior; sic me Deus adjuvet et hæc Sancta, etc." Then the appellant responds: "Hoc audis homo quem per manum teneo, qui te R.

merely the loss of the suit, but was also a conviction of perjury, to be punished as such; and in criminal cases it was also a conviction of malicious prosecution on the part of a worsted appellant. That it was regarded as much more serious than the simple loss of a suit is shown by the provisions of the custom of Normandy, whereby a vanquished combatant was classed with perjurers, false witnesses, and other infamous persons, as incapable thenceforth of giving evidence in courts, or of serving on a jury.[1] Accordingly, we find the vanquished party, whether plaintiff or defendant, subjected to penalties more or less severe, varying with time and place.

This was a primeval custom, even in civil cases. In the ancient laws of the Alamanni, when there was controversy as to the ownership of land, the contestants brought to the court of the district some earth and branches of trees from the disputed property. These were wrapped and sealed and placed in the lists, where the combatants touched the bundle with their swords and called upon God to grant victory to the right; the land passed to the victor and the defeated party was fined twelve sous for having made an unjust claim.[2] The tendency, as civilization advanced, was to render the penalty more severe. Thus, in 819, Louis le Débonnaire decreed that, in cases where testimony was evenly balanced, one of the witnesses

facis appellari per nomen baptismi tui, quod tu es perjurus et ideo perjurus quia tali anno, tali die, tali hora et tali loco nequiter et in felonia occidisti C. fratrum meum tali genere armorum, unde obiit infra triduum; sic me Deus, etc."—Lib. I. cap. xxxii. §§ 28, 29.—Bracton, Lib. III. Tract ii. c. 21, § 2.

In the German law the oath was simpler, but quite as absolute.—Jur. Prov. Saxon, Lib. I. cap. lxii.—Sachsische Weichbild, xxxv. 8.

By the ordonnance of Philippe le Bel in 1306 each party was obliged to take three solemn oaths on relics before a priest, asserting his good cause in the most positive manner and his reliance on the judgment of God.—Isambert, Anc. Lois Françaises, II. 840.

[1] Cod. Leg. Normann. P. I. c. lxiv. (Ludewig. Reliq. MSS. T. VII. p. 270).—Anc. Cout. de Normandie (Bourdot de Richebourg, IV. 29).

[2] Leg. Alamann. Tit. 84.

from each side should be chosen to fight it out, the defeated champion suffering the usual penalty of perjury—the loss of a hand; while the remaining witnesses on the losing side were allowed the privilege of redeeming their forfeited members at the regular legal rate.[1] William the Conqueror imposed a fine of forty sous on the losing side impartially;[2] this was increased to sixty sous by the compilation known as the laws of Henry I.;[3] and the same regulation is stated by Glanville, with the addition that the defeated person was forever disqualified as a witness or champion;[4] but in practice the amount seems to have been indefinite, for in the Pipe Rolls the fines levied for *recreantise* vary from one mark to a hundred.[5] In a case occurring in 1221 where the defendant was victorious the record simply states that the appellant was ordered into custody;[6] while in the time of Edward II. the loser, except in cases of felony, paid to the victor forty sous besides a small gratification under the name of *ruaille*, in addition to the loss of the suit.[7] By the Lombard customs, early in the eleventh century, the appellant, if vanquished, had the privilege of redeeming his hand; the defendant, if defeated, lost his hand, and was of course subject in addition to the penalties of the crime of which he was proved guilty.[8] About the same time the Béarnese legislation is more merciful, a fine of sixty-six

[1] Capit. Ludov. Pii ann. 819, cap. x. A somewhat similar provision occurs in the L. Burgund. Tit. xlv. et lxxx.

[2] L. Guillelmi Conquest. III. xii. (Thorpe, I. 493).—A previous law, however, had assessed a Norman appellant sixty sous when defeated (Ibid. II. ii.).

[3] L. Henrici I. cap. lix. § 15.

[4] Glanvil. de Leg. Angl. Lib. II. cap. iii.

[5] Pipe Roll Society, I. 21; II. 31, 46, 59; III. 10.

[6] Maitland, Select Pleas of the Crown, I. 108.

[7] Solement ceux vainqus sont quittes ou lour clients pur eux rendre aux combattants vanquishours 40 sous en nosme de recreantise et ruaille peur la bourse a mettre eins ses deniers oustre le jugement sur le principall.—Horne's Myrror of Justice, cap. iii. sect. 23.

[8] Formul. Vetus in L.-Longobard. (Georgisch, p. 1276).

sous Morlaas being imposed impartially on the losing party.[1] In process of time this system was abandoned in some countries. The English law of the thirteenth century admitted the justice of the *lex talionis* in principle, but did not put it in practice, a vanquished appellant in capital cases being merely imprisoned as a calumniator, while the defendant, if defeated, was executed and his property confiscated.[2] The same distinction is to be found in the contemporary custom of Normandy.[3] So, by the code in force in Verona in 1228, the Podestà in criminal cases had the power of ordering the duel, and of punishing at his pleasure the accuser if vanquished—the accused when convicted of course undergoing the penalty of his crime.[4] Towards the end of the thirteenth century, however, there were some sceptics in Italy who argued that conviction by the duel ought not to entail the same punishment as conviction by witnesses "quia pugna est incertum Dei judicium." This struck directly at the root of the whole system, and Roffredo insists that the legal penalty is to be enforced.[5]

Mediæval legislation was not usually lenient to a worsted appellant. The application of the *lex talionis* to the man who brought a false charge, thus adjudging to him the penalty which was incurred by the defendant if convicted, was widely current during the Middle Ages. This principle is to be found enunciated in the broadest and most decided manner in the ecclesiastical law,[6] and it was naturally brought into play in regulating the fate of those engaged in the wager of battle.

[1] For d'Oloron, Art. 21.

[2] Bracton, Lib. III. Tract. ii. cap. 18, § 4. In another passage, Bracton gives a reason for this clemency—"Si autem victus sit in campo . . . quamvis ad gaolam mittendus sit, tamen sit ei aliquando gratia de misericordia, quia pugnat pro pace" (Ibid. cap. 21, § 7). See also the Fleta, Lib. I. cap. xxxii. § 32.

[3] Étab. de Normandie, Tit. "De prandre fame à force" (Marnier).

[4] Lib. Juris Civilis Veronæ, cap. 78 (p. 63).

[5] Odofredi Summa de Pugna c. xii. (Patetta, p. 491–2).

[6] Qui calumniam illatam non probat, pœnam debet incurrere quam si probasset reus utique sustineret.—C. 2 Decret. Caus. v. q. vi.

Thus Guillaume le Breton states that when Philip Augustus, in 1203, wrested Normandy from the feeble grasp of John Lackland, one of the few changes which he ventured to introduce in the local laws of the duchy was to substitute this rule of confiscation, mutilation, or death, according to the degree of criminality involved in the accusation, for the comparatively light pecuniary mulct and loss of legal status previously incurred by a worsted appellant.[1] The same system is followed throughout the legislation of St. Louis, whether the punishment be light or capital, of an equal responsibility on both parties.[2] In capital cases, when champions were employed, the principals were held in prison with the cord around them with which the defeated party was to be hanged; and if one were a woman, for the cord was substituted the spade wherewith she was to be buried alive.[3] The same principle of equal responsibility prevailed throughout the Frankish kingdoms of the East, where, in an appeal of murder, as we have seen, the appellant fought by means of one of his witnesses, and the defendant personally. In civil cases, in the Bourgeois Court, the party defeated, including the plaintiff, if his side was the loser, was forever debarred from giving testimony, and had no future standing in court; while in serious criminal cases, in

[1] . . . ad poenas exigat æquas,
Victus ut appellans sive appellatus, eadem
Lege ligaretur mutilari aut perdere vitam.
Moris enim extiterit apud illos hactenus, ut si
Appellans victus in causa sanguinis esset,
Sex solidos decies cum nummo solveret uno
Et sic impunis, amissa lege, maneret:
Quod si appellatum vinci contigeret, omni
Re privaretur et turpi morte periret.

Guillielmi Brito. Phillippidos Lib. VIII.

It will be observed that the pre-existing Norman custom here described is precisely that indicated above by Glanville.

[2] *E. g.* Établissements Lib. I. cap. 27 and 91.—"Cil qui seroit vaincus seroit pendus" (cap. 82).

[3] Beaumanoir, chap. lxiv. § 10.

both upper and lower courts, either side, when defeated, was hanged with the utmost impartiality;[1] and it finally established itself in England, where in the fourteenth century we find it positively declared as an imperative regulation by Thomas, Duke of Gloucester, in an elaborate treatise on the rules of single combat printed by Spelman.[2]

In Germany the custom was not uniform. In the Sachsenspiegel, and in one text of the Schwabenspiegel, the principle is laid down that a defeated appellant escaped with a fine to the judge and to his adversary, while the defendant, if vanquished, was visited with the punishment due to his crime, or even with a heavier penalty;[3] while the Saxon burgher law and another text of the Suabian code direct that whichever party be defeated should lose a hand, or be executed, according to the gravity of the crime alleged.[4] An exceptional case, moreover, was provided for, in which both antagonists might suffer the penalty; thus, when a convicted thief accused a receiver of stolen goods of having suggested the crime, the latter was bound to defend himself by the duel, and if defeated, both combatants were hanged without further ceremony.[5] That these penalties were not merely nominal is shown by a case which occurred at Frankfort in 1369, when the divine interference was requisite, not to determine the victor, but to evade the enforcement of the law. Two knights, Zierkin von Vola and Adolf Hanche, who had married two sisters, quarrelled over the inheritance of a deceased brother-in-law, and agreed to settle their difference by the duel.

[1] Assises d'Antioche, Haute Cour, ch. xi.; Assises des Bourgeois, ch. vi. vii. See also Assises de Jerusalem, cap. 317.

[2] Recta fides et æquitas et jus armorum volunt ut appellans eandem incurrat pœnam quam defendens, si is victus fuerit et subactus.—Formula Duelli, apud Spelman. Glossar. s. v. *Campus*.

[3] Jur. Provin. Saxon, Lib. 1. c. 63.—Jur. Provin. Alamann. cap. ccclxxxvi. §§ 19, 20 (Ed. Schilter.).

[4] Sachsische Weichbild, 82.—Jur. Provin. Alamann. cap. clxviii. § 20; clxxii. § 18 (Ed Senckenberg.).

[5] Ibid. cap. ccxix. § 6 (Ed. Schilter.).

When the appointed day came, October 12, they entered the lists on their chargers, prepared to do battle to the death, while their pious wives were earnestly praying God to soften their hearts and incline them to peace. These prayers were heard. With a mutual impulse the two warriors leaped from their horses, throwing themselves into each other's arms and exclaiming, "Brother, I confess myself vanquished." The chief magistrate of the city, who presided over the combat, was not disposed to deprive the spectators of their promised entertainment, and indignantly declared that the law of the duel did not permit both antagonists to depart unhurt, for the one who yielded must be put to death; and he confirmed this sentence by a solemn oath that one or the other should die before he would taste food. Then an affecting contest arose between the late antagonists, each one proclaiming himself the vanquished and demanding the penalty on his own head, when suddenly divine vengeance visited the bloody and remorseless judge, who fell dead, thus fulfilling his impious vow that he would not eat until he had a victim.[1]

It was probably as an impressive symbol of the penalties affixed by law to defeat in these combats that in some places the suggestive custom was in force of placing in the lists two biers in readiness for their ghastly occupants. In a duel which occurred at Augsburg in 1409, between two men named Marschalck and Hachsenacker, the former threw his adversary on the ground, and then asked him what he would have done had he been the victor. Hachsenacker grimly replied that he would have slain his foe, whereupon Marschalck despatched him, and placing himself in his bier caused himself to be carried to the church of St. Ulric, where he returned thanks for his victory.[2]

The most hideous exaggeration of the system, however, was found in the Frankish kingdoms of the East, which reserved a special atrocity for women—one of the numerous instances

[1] Chron. Cornel. Zantfliet ann. 1369 (Mart. Ampl. Coll. V. 293–4).

[2] Chron. Augustan. (Pistor. III. 684, Ed. 1726).

to be observed in mediæval law of the injustice applied habitually to the weaker sex. When a woman appeared, either as appellant or defendant, in the lists by her champion, if he was defeated she was promptly burnt, no matter what was the crime for which the duel occurred—and as many accusations could only be determined by the wager of battle, she had no choice but to undergo the chance of the most dreadful of deaths.[1]

It was not customary to order the combat to take place immediately, but to allow a certain interval for the parties to put their affairs in order and to undergo the necessary training. In Southern Germany this delay was for nobles from four to six weeks, and for others a fortnight, and during this period any assault by one on the other was a capital offence.[2] They were required to give security for their due appearance at the appointed time, various fines and punishments being inflicted on defaulters. By the law of both Northern and Southern Germany, when default was made by the defendant he was held guilty of the crime charged upon him: and if he was allowed the privilege of redeeming hand or life either as defendant or appellant, he was declared infamous, and deprived of the protection of the law. According to some MSS., indeed, all the possessions of a defaulter were forfeited, either to his heirs or to his feudal superior.[3] In a case occurring in the twelfth century in Hainault, between a seigneur and a man whom he claimed as a serf, the latter demanded the duel, which was allowed, but on the appointed day he failed to appear by nine o'clock. His adversary had waited for him since daybreak, and claimed the verdict which was awarded him by the council of Hainault. At this moment the missing man pre-

[1] Assis. Hierosol. Alta Corte cap. cv. (Canciani, V. 208).

[2] Würdinger, Beiträge zur Geschichte des Kampfrechtes in Bayern, p. 8.

[3] Jur. Provin. Saxon. Lib. I. c. 63, 65.—Sachsische Weichbild, xxxv. —Jur. Provin Alamann. cap. ccclxxxvi. § 31 (Ed. Schilter.); cap. clxxviii. §§ 7, 8 (Ed. Senckenb.). See Würdinger, p. 11, for the solemn sentence placing the defaulter under the ban.

sented himself, but was adjudged to be too late, and was delivered to his claimant as a serf. According to the custom of Flanders, indeed, the combatant who failed to appear suffered banishment, with confiscation of all his possessions.[1] This extreme rigor, however, did not obtain universally. Among the Béarnese, for instance, the forfeiture for a default was only sixteen sous Morlaas.[2] By the English law, the defaulter was declared infamous, and was also liable to a fine to the king, for which there was apparently no fixed amount.[3] The Scandinavians punished him popularly by erecting a "nithstong"—*pertica execrationis*—a post inscribed with defamatory runes, and so flagrant was this insult considered, that finally it was prohibited by law under pain of exile.[4] Perhaps the most emphatic assertion, however, of the obligation to appear is the rule in the law of the Scottish Marches in 1249, that if the accused should die before the appointed day his body must be brought to the lists, "for no man can essoin himself by death."[5]

The bail, of course, was liable for all legal penalties incurred by a defaulter, and occasionally, indeed, was made to share the fate of his principal, when the latter appeared and was defeated. In the law of Southern Germany, according to one text, the bail under these circumstances was liable to the loss of a hand, which, however, he could redeem, while another version makes him suffer the penalty incurred by his principal.[6] This latter rule is announced in a miracle play of the fourteenth century, where a stranger knight at the court of

[1] Proost, Législation des Jugements de Dieu, pp. 18, 21.

[2] For de Morlaas, Rubr. IV. art. 5.

[3] Horne's Myrror of Justice, cap. iv. sect. 13.—Pipe Roll Society, I. 65.

[4] Schlegel Comment. ad Grágás § 31.—Grágás sect. VIII. cap. 105. A fanciful etymologist might trace to this custom the modern phrase of "posting a coward."

[5] Neilson, Trial by Combat, p. 128.

[6] Jur. Provin. Alamann. cap. cccIxxxvi. § 32 (Ed. Schilter.); cap. clxxiii. § 13 (Ed. Senckenberg.).

Paris, compelled to fight in defence of the honor of the king's daughter, is unable to find security. The queen and princess offer themselves as hostages and are accepted, but the king warns them—

> Dame, par Dieu le roy celestre!
> Bien vous recevray pour hostage;
> Mais de tant vous fas-je bien sage,
> Se le dessus en peut avoir
> Ardré, je vous feray ardoir.
> Et mettre en cendre.[1]

Poverty on the part of one of the combatants, rendering him unable to equip himself properly for the combat, was not allowed to interfere with the course of justice. In such cases, under the law of Northern Germany, the judge was required to provide him with the requisite weapons.[2] In England, where the royal jurisdiction embraced all criminal cases, the king furnished the weapons and paid all expenses, and when the combatant was an "approver," or criminal who had turned state's evidence, he was supported until his duty was accomplished of fighting all whom he accused as accomplices. Thus in the accounts of the sheriff of Lincolnshire for 1190, there is an entry of 15*s.* 10*d.* for the approver Adam Godechap from Pask until Michaelmas at one penny per diem; also 6*s.* for his armor in three duels, and 38*s.* 6*d.* for carts to convey prisoners, sureties, and probators from Lincoln to London and

[1] Un Miracle de Notre-Dame d'Amis et d'Amille (Monmerqué et Michel, Théat. Français au Moyen-Age, p. 238).

Another passage in the same play signifies the equality of punishment for appellant and defendant in cases of defeat:—

> —Mais quant il seront
> En champ, jamais n'en ysteront
> Sans combatre, soiez-en fis,
> Tant que l'un en soit desconfis;
> Et celui qui vaincu sera,
> Je vous promet, pendu sera:
> N'en doubte nulz.

[2] Jur Provin. Saxon, I. 63.

elsewhere.[1] The crown likewise paid the expenses of administering the other ordeals: in 1166 a single entry in the Exchequer accounts shows payment for thirty-four ordeals and five battles.[2]

As regards the choice of weapons, much curious anecdote could be gathered from the pages of Brantôme and others learned in punctilio, without throwing additional light upon mediæval customs. It may be briefly observed, however, that when champions were employed on both sides, the law appears generally to have restricted them to the club and buckler, and to have prescribed perfect equality between the combatants.[3] An ordonnance of Philip Augustus, in 1215, directs that the club shall not exceed three feet in length.[4] In England the club or battoon was rendered more efficient with a "crook," usually of horn, but sometimes of iron, giving to the weapon the truly formidable aspect of a pickaxe or tomahawk.[5] When the principals appeared personally, it would seem that in early times the appellant had the choice of weapons, which not only gave him an enormous advantage, but enabled him to indulge any whims which his taste or fancy might suggest, as in the case of a Gascon knight in the thirteenth century, who stipulated that each combatant should be crowned with a wreath of roses. As every detail of equipment was thus subject to the caprice of the challenger,

[1] Venables, Lincolnshire Notes and Queries, Vol. I. p. 195 (1889). So an entry in the Pipe Roll for 1158–9 "Et in conductu Rad. Shirloc. 6*s*. 8*d*. Et pro apparatu ejusdem Rad. et socii ejus ad duellum 16*s*. 4*d*.—Pipe Roll Society, I. 2.

[2] Neilson, Trial by Combat. p. 42.

[3] *E. g.* Constit. Sicular. Lib. II. Tit. xxxvii. § 1. This was also the case in Bohemia (Patetta, Le Ordalie, p. 159).

[4] Laurière, Table des Ordonn. p. 10.

[5] See facsimile of a record of a duel between Walter Blowberme and Hamo le Stare, where in the background the latter unlucky defendant is represented as hanging on a gallows (Maitland's Select Pleas of the Crown, Vol. I.). It had already been engraved in Bysshe's notes to Upton's De Studio Militari, p. 37.

those who were wealthy sometimes forced their poorer adversaries to lavish immense sums on horses and armor.[1] When, however, the spirit of legislation became hostile to the wager of battle, this advantage was taken from the appellant. Frederic II. appears to have been the first to promulgate this rational idea, and, in decreeing that in future the choice of arms shall rest with the defendant, he stigmatizes the previous custom as utterly iniquitous and unreasonable.[2] In this, as in so many other matters, he was in advance of his age, and the general rule was that neither antagonist should have any advantage over the other, except the fearful inequality, to which allusion has already been made, when a roturier dared to challenge a gentleman.[3] In the law of Northern Germany care was taken that the advantage of the sun was equally divided between the combatants; they fought on foot, with bare heads and feet, clad in tunics with sleeves reaching only to the elbow, simple gloves, and no defensive armor except a wooden target covered with hide, and bearing only an iron boss; each carried a drawn sword, but either might have as many more as he pleased in his belt.[4] Even when nobles were concerned, who fought on horseback, it was the rule that they should have no defensive armor save a leather-covered wooden shield and a glove to cover the thumb; the weapons allowed were lance, sword, and dagger, and they fought bare-headed and clad in linen tunics.[5] According to Upton, in the fifteenth century, the judges were bound to see that the arms were equal, but he admits that on many points there were no settled or definite rules.[6] In Wales, an extraordinary custom violated all the principles of equality. Under the Welsh law, twins were considered as one person, and as they were entitled to but one share in the patrimony of the family, so they were allowed to

[1] Revue Historique de Droit, 1861, p. 514.
[2] Constit. Sicular. Lib. II. Tit. xxxvii. § 4.
[3] This, moreover, was not permitted by Frederic (*Ubi sup.*).
[4] Jur. Provin. Saxon. I. 63. [5] Würdinger, Beiträge, p. 22.
[6] De Militari Officio Lib. II. cap. viii.

come into the field of combat as one man.[1] In Russia, each combatant followed his own pleasure; and a traveller in the sixteenth century relates that the Muscovites were in the habit of embarrassing themselves with defensive armor to an extent which rendered them almost helpless, so that in combats with Poles, Lithuanians, and Germans they were habitually worsted, until judicial duels between natives and foreigners were at length prohibited on this account.[2]

As a general rule the combat ended at sunset or when the stars became visible, and in such case if it was a drawn battle the case was decided in favor of the defendant, because the prosecutor had not proved his charge. Yet a charter of 961 recites that two gentlemen, Bernard and Gerbert, appeared before Count Raymond, each claiming the church of St. Médard and its appurtenances, which had been bequeathed by the late owner Ricaud, for the repose of his soul, to the Abbey of St. Peter of Beaulieu. The count granted them the trial by battle. At two o'clock their champions entered the lists and fought without result until sunset. Then the count declared the battle ended and adjudged the church to the abbey; the contestants acquiesced and signed the charter confirming its rights.[3] In Italy, however, the duel was fought to an end; if stopped by darkness the judge was instructed to note carefully the respective positions of the combatants and replace them exactly the next morning, so that neither might derive advantage from the adjournment.[4]

The issue at stake being death or dishonor, with severe penalties hanging over the vanquished, whether principal or champion, no chivalric courtesy was to be expected in these combats. They were fought to the bitter end with persistent and brutal ferocity, resembling the desperate encounters of wild beasts. A fairly illustrative example is furnished in an inci-

[1] Book of Cynog, chap. xi. § 34 (Owen, II. 211).

[2] Du Boys, op. cit. I. 611.

[3] D'Achery Spicilegium, T. III. p. 376.

[4] Odofredi Summa de Pugna, vii. xi. (Patetta, pp. 490, 491).

dent which followed the assassination of Charles the Good of Flanders in 1127. One of the accomplices, a knight named Guy, was challenged for complicity by another named Herman. Both were renowned warriors, but Herman was speedily unhorsed by his adversary, who with his lance frustrated all his attempts to remount. Then Herman disabled the horse of his opponent and the combat was renewed on foot with swords. Equally skilful in fence they continued the struggle till fatigue compelled them to drop sword and shield and they wrestled for the mastery. Guy threw his antagonist, fell on him and beat him in the face with his gauntlets till he seemed to be motionless, but Herman quietly slipped his hand below the other's coat of mail, grasped his testicles and with a mighty effort wrenched them away. Guy fell over and expired; he we adjudged guilty and his body, after exposure in the pillory, was hung on the top of a mast along with that of the leader of the conspiracy who had been executed the same day, the two corpses being made to embrace each other, as though conferring about the plot.[1] Ghastly details such as these serve to emphasize the difference between the judicial combat and the modern duel.

CHAPTER VII.

CHAMPIONS.

Allusions have occurred above to the employment of champions, a peculiarity of these combats which received an application sufficiently extended to deserve some special notice.[2]

[1] Galfridi Vit. Caroli Boni, cap. xiii. n. 94.

Similar persistence was exhibited in a combat before Richard II. in 1380. Katrington, the defeated defendant died the next day in delirium caused by exhaustion.—Neilson's Trial by Combat, p. 172.

[2] It is perhaps worthy of remark that in India, where the judicial duel was unknown, in the other ordeals one of the ancient lawgivers, Katyayana, allows, and in some cases prescribes, the use of champions.—Patetta, Le Ordalie, p. 110.

It has been seen that those unable to wield the sword or club were not therefore exempted from the duel, and even the scantiest measure of justice would require that they should have the right to delegate their vindication to some more competent vehicle of the Divine decision. This would seem originally to have been the office of some member of the family, as in the cognate procedure of sacramental purgation. Among the Alamanni, for instance, a woman when accused could be defended by a kinsman *cum tracta spata;*[1] the same rule is prescribed by the Lombard law,[2] and by that of the Angli and Werini;[3] while the universal principle of family unity renders the presumption fair that it prevailed throughout the other races in whose codes it is not specifically indicated. Restricted to cases of disability, the use of champions was a necessity to the battle ordeal; but at a very early period the practice received a remarkable extension, which was directly in conflict with the original principles of the judicial duel, in permitting able-bodied antagonists to put forward substitutes, whether connected with them or not by ties of blood, who fought the battle for their principals. With regard to this there appears to have been a considerable diversity of practice among the races of primitive barbarians. The earliest Frisian laws not only grant unlimited permission for their employment, but even allow them to be hired for money.[4] The laws of the Franks, of the Alamanni, and of the Saxons make no allusion to such a privilege, and apparently expect the principal to defend his rights himself, and yet an instance occurs in 590, where, in a duel fought by order of Gontran, the defendant was allowed to intrust his cause to his nephew, though, as he was accused of killing a stag in the king's forest,

[1] L. Alamann. Add. cap. xxi.

[2] L. Longobard. Lib. I. Tit. iii. § 6, and Lib. II. Tit. lv. § 12.

[3] L. Anglior. et Werinor. Tit. XIV.

[4] Licet unicuique pro se campionem mercede conducere si eum invenire potuerit.—Ll. Frision. Tit. XIV. c. iv.

physical infirmity could hardly have been pleaded.[1] From some expressions made use of by St. Agobard, in his onslaught on the ordeal of battle, we may fairly presume that, under Louis le Débonnaire, the employment of champions, in the Burgundian law, was, if not forbidden, at least unusual as respects the defendant, even in cases where age or debility unfitted him for the combat, while it was allowed as a matter of course to the appellant.[2] On the other hand, the Baioarian law, which favored the duel more than any of the other cognate codes, alludes to the employment of champions in every reference to it, and with the Lombards the judicial combat and the champion seem to have been likewise convertible terms even with regard to defendants.[3] In a charter of the latter half of the tenth century in France, recording a judicial duel to decide a contest concerning property, the judge, in ordering the combat, calls upon the antagonists to produce skilled champions to defend their claims at the time and place indicated, which would show that the principals were not expected to appear personally.[4] Under the North German law it rested with the appellant to demand the duel either with or without champions. If the defendant were crippled, and was on that account obliged to appear by a hired champion, then the appellant could put forward another to meet him. A defendant, moreover, who had suffered a previous conviction for theft or rapine was always obliged to appear personally. When the duel was decreed by the court, and not demanded

[1] Greg. Turon. Hist. Lib. x. cap. x. In this case, both combatants perished, when the accused was promptly put to death, showing that such a result was regarded as proving the truth of the offence alleged.

[2] Horum enim causa accidit ut non solum valentes viribus, sed etiam infirmi et senes lacessantur ad certamen et pugnam etiam pro vilissimis rebus (Lib. adv. Legem Gundobadi cap. vii.). Mitte unum de tuis, qui congrediatur mecum singulari certamine, ut probat me reum tibi esse, si occiderit (Lib. contra Judicium Dei cap i.).

[3] Liceat ei per campionem, id est per pugnam, crimen ipsum de super se si potuerit ejicere.—L. Longobard. Lib. i. Tit. i. § 8.

[4] Proost, Législation des Jugements de Dieu, p. 82.

by the appellant, then the accused could decline it if he could prove that the prosecutor had hired a champion.[1] The practical spirit of the Italians led to the universal substitution of champions for the principals; they were selected by the magistrates and were paid by the state when the parties were too poor to bear the expense.[2]

In all these provisions for the putting forward of substitutes in the duel there is something so repugnant to the fierce and self-relying spirit in which the wager of battle found its origin, and the use of a professional gladiator is so inconsistent with the pious reference to the judgment of God, which was the ostensible excuse for the duel, that some external reason is required to account for its introduction. This reason is doubtless to be found in the liberty allowed of challenging witnesses, to which allusion has already been made (p. 121). The prevalence of this throughout Western Europe readily enabled parties, unwilling themselves to encounter the risks of a mortal struggle, to put forward some truculent bravo who swore unscrupulously, and whose evidence would require him to be forced out of court at the sword's point.

This becomes very evident as early as we have detailed regulations of procedure in the books of the twelfth and thirteenth centuries. In England, for instance, until the first statute of Westminster, issued by Edward I., in 1275, the hired champion of the defendant, in a suit concerning real estate, was obliged to assume the position of a witness, by swearing that he had been personally present and had seen seizin given of the land, or that his father when dying had enjoined him by his filial duty to maintain the defendant's

[1] Jur. Provin. Saxon. Lib. I. art. 39, 48.—Sachsische Weichbild, art. xxxv. 2. 4; art. lxxxii. 2.

[2] Patetta, Le Ordalie, pp. 427–9. Roffredo, after carefully enumerating six cases in which champions were allowed by the law, adds: "Hodie tamen de consuetudine permittitur cuilibet campionem dare."—Odofredi Summa de Fugna (Patetta, p. 485).

title as though he had been present.[1] This legal fiction was common also to the Norman jurisprudence of the period, where in such cases the champion of the plaintiff was obliged to swear that he had heard and seen the matters alleged in support of the claim, while the opposing champion swore that they were false.[2] In a similar spirit, an earlier code of Normandy prescribes that champions shall be taken to see the lands and buildings in dispute, before receiving the oath of battle, in the same manner as a jury of view.[3] We have seen that in the Assises d'Antioche it was requisite for a prosecutor or a plaintiff to have a witness who was ready to offer battle, in default of which the unsupported oath of the other party was sufficient to secure a verdict.[4] It necessarily follows that this witness must in most cases have been a hired champion, and this connection between the two functions is further shown in the regulation of the Assises de Jerusalem and of the Sicilian constitutions, which directed that the champion should swear on the field of battle as to his belief in the justice of the quarrel which he was about to defend,[5] a practice which is also found in the Scottish law of the thirteenth century.[6] An English legal treatise of the period, indeed, assumes that the principals can put forward only witnesses as substitutes, and gives as a reason why combats in civil suits were always conducted by champions, that in such cases the principals could not act as witnesses for themselves.[7] In a similar spirit, if on the field of battle one of the parties presented a champion who

[1] Glanvil. de Leg. Angl. Lib. II. iii. Thus in a suit over a knight's fee in 1201, the plaintiffs offer a champion, Walter Wider, "qui idem optulit ut de visu suo et auditu."—Baildon, Select Civil Pleas, I. 33.

[2] Cod. Leg. Norman. P. II. cap. lxiv. (Ludewig Reliq. MSS. VII. 416).

[3] Étab. de Normandie, p. 21 (Marnier).

[4] Assises d'Antioche, Haute Cour, ch. ix. xi. xii.; Assises des Bourgeois, ch. vi. vii.

[5] Assis. Hierosol. Bassa Corte, cap. ccxxxviii. (Canciani, II. 534).—Constit. Sicular. Lib. II. Tit. xxxvii. § 2.

[6] Neilson's Trial by Combat, pp. 88, 90–1.

[7] Horne's Myrror of Justice, cap. iii. § 23.

was not receivable as a witness and had not been accepted by the court, the case could be decided against him by default.[1]

Looking on the profession of a champion in this light, as that of a witness swearing for hire, we can find a justification for the heavy penalties to which he was subjected in case of defeat—penalties of which the real purport presumably was to insure his fidelity to his principal. Thus, in the Norman coutumier above referred to, in civil suits as to disputed landed possessions, the champion swearing to the truth of his principal's claim was, if defeated, visited with a heavy fine and was declared infamous, being thenceforth incapable of appearing in court either as plaintiff or as witness, while the penalty of the principal was merely the loss of the property in dispute;[2] and a similar principle was recognized in the English law of the period.[3] In criminal cases, from a very early period, while the principal perhaps escaped with fine or imprisonment, the hired ruffian was hanged, or at best lost a hand or foot, the immemorial punishment for perjury;[4] while the laws of the Kingdom of Jerusalem prescribe that in combats between champions, the defeated one shall be promptly hanged, whether dead or alive.[5] The Assises d'Antioche are somewhat more reasonable, for they provide merely that the

[1] Myrror of Justice, cap. iv. § 11.

[2] Cod. Leg. Norman. P. II. cap. lxiv. § 18 (Ludewig VII. 417).

[3] Among the crimes entailing infamy is enumerated that of "ceux qui combatent mortelment pur loyer qui sont vanquish en combate joyné per jugement."—Horne's Myrror of Justice, cap. iv. sect. 13.

[4] Et campioni qui victus fuerit, propter perjuriam quod ante pugnam commisit, dextra manus amputetur (Capit. Ludov. Pii ann. 819, § x.).—Victus vero in duello centum solidos et obolum reddere tenebitur. Pugil vero conductitius, si victus fuerit, pugno vel pede privabitur (Charta ann. 1203—Du Cange).—Also Beaumanoir, Cout. du Beauv., cap. lxvii. § 10 (Du Cange seems to me to have misinterpreted this passage).—See also Monteil's admirable "Histoire des Français des divers États," XVe Siècle, Hist. XIII.

[5] Assis. Hierosol. Bassa Corte, cap. ccxxxviii. Alta Corte, cap. cv. (Canciani II. 534; V. 268).

vanquished champion and his principal shall suffer the same penalty, whether simply a forfeiture of civil rights in civil cases, or hanging as in accusations of homicide or other serious crime.[1] That, in the later periods, at least, the object of this severity was to prevent the champion from betraying his employer's cause was freely admitted. Beaumanoir thus defends it on the ground of the liability of champions to be bought over by the adverse party, which rendered the gentle stimulus of prospective mutilation necessary to prevent them from being purchased by the adversary;[2] and it is probably owing to this that the full severity of the punishment is shown to be still in existence by a charter of so late a date as 1372, when the use of the judicial duel had fully entered on its decline.[3] In the same spirit, the Emperor Frederic II. prohibited champions from bargaining with each other not to use teeth and hands. He commanded them to inflict all the injury possible on their adversaries, and decreed that they should, in case of defeat, share the punishment incurred by the principal, if the judge of the combat should consider that through cowardice or treachery they had not conducted the duel with proper energy and perseverance.[4]

With such risks to be encountered, it is no wonder that the trade of the champion offered few attractions to honest men, who could keep body and soul together in any other way. In primitive times, the solidarity of the family no doubt caused the champion in most cases to be drawn from among the kindred; at a later period he might generally be procured

[1] Assises d'Antioche, Haute Cour, ch. xi.; Assises des Bourgeois, ch. vi. vii.

[2] Et li campions vaincus a le poing copé; car se n'estoit por le mehaing qu'il emporte, aucuns, par barat, se porroit faindre par loier et se clameroit vaincus, par quoi ses mestres emporteroit le damace et le vilonie, et cil emporteroit l'argent; et por ce est bons li jugemens du mehaing (Cout. du Beauv., cap. lxi. § 14).

[3] Isambert, Anciennes Lois Françaises V. 387.

[4] Constit. Sicular. Lib. II. Tit. xxxvii. § 3.

from among the freedmen or clients of the principal, and an expression in the Lombard law justifies the assumption that this was habitual, among that race at least.[1] In the palmy days of chivalry, it was perhaps not uncommon for the generous knight to throw himself bodily into the lists in defence of persecuted and friendless innocence, as he was bound to do by the tenor of his oath of knighthood.[2] Even as late as the fifteenth century, indeed, in a collection of Welsh laws, among the modes by which a stranger acquired the rights of kindred is enumerated the act of voluntarily undergoing the duel in the place of a principal unable or unwilling to appear for himself.[3] A vast proportion of pleaders, however, would necessarily be destitute of these chances to avoid the personal appearance in the arena for which they might be unfitted or disinclined, and thus there arose the regular profession of the paid gladiator. Reckless desperadoes, skilled at quarter-staff, or those whose familiarity with sword and dagger, gained by a life spent in ceaseless brawls, gave them confidence in their own ability, might undertake it as an occupation which exposed them to little risk beyond what they habitually incurred, and of such was the profession generally composed. This evil must have made itself apparent early, for we find Charlemagne endeavoring to oppose it by decreeing that no robber should be allowed to appear in the lists as a champion, and the order needed to be frequently repeated.[4]

[1] Et post illam inquisitionem, tradat manum ipse camphio in manu parentis aut conliberti sui ante judicem.—L. Longobard. Lib. II. Tit. lv. § 11.

[2] Thus the oath administered by the papal legate to William of Holland, on his receiving knighthood previous to his coronation as King of the Romans in 1247, contains the clause "pro liberatione cujuslibet innocentis duellum inire."—Goldast. Constit. Imp. T. III. p. 400.

[3] Anomalous Laws, Book X. chap. ii. § 9 (Owen, II. 315). The position thus acquired was that of brother or nephew in sharing and paying *wer-gild*.

[4] Ut nemo furem camphium mancipiis aut de qualibet causa recipere præsumat, sicut sæpius dominus imperator commendavit.—Capit. Carol. Mag. ex L. Longobard. cap. xxxv. (Baluże).

When the Roman law commenced to exercise its powerful influence in moulding the feudal customs into a regular body of procedure, and admiring jurists lost no opportunity of making use of the newly-discovered treasures of legal lore, whether applicable or not, it is easy to understand that the contempt and the civil disabilities lavished by the Imperial jurisprudence on the gladiator of antiquity came to be transferred to the mediæval champion; although the latter, by the theory of the law, stood forth to defend the innocent, while the former ignobly exposed his life for the gratification of an imbruted populace. This legacy of shame is clearly traceable in Pierre de Fontaines. To be a gladiator or an actor was, by the Roman law, a competent cause for disinheritance.[1] One of the texts prescribing it is translated bodily by de Fontaines, the *arenarius* of the Roman becoming the *champions* of the Frenchman;[2] and in another similar transcription from the Digest, the *athleta* of the original is transformed into a "champion."[3] By the thirteenth century, the occupation of champion had thus become infamous. Its professors were classed with the vilest criminals, and with the unhappy females who exposed their charms for sale, as the champion did his skill and courage.[4] They were held incapable of appearing as witnesses, and the extraordinary anomaly was exhibited of seeking to learn the truth in affairs of the highest moment by a solemn appeal to God, through the instrumentality of those who were already considered as convicts of the worst kind, or

[1] Novel. CXV. cap. iii. § 10—more fully set forth in Lib. III. Cod. Tit. xxvii. l. 11.

[2] Conseil. chap. xxxiii. tit. 32.

[3] Ibid. chap. xv. tit. 87, which is a translation of Lib. IV. Dig. Tit. ii. l. 23, § 2.

[4] Percutiat si quis hominem infamem, hoc est lusorem vel pugilem, aut mulierem publicam, etc.—Sachsische Weichbild, Art. cxxix. "Plusieurs larrons, ravisseurs de femmes, violleurs d'églises, batteurs à loyer," etc.—Ordonn. de Charles VII. ann. 1447, also Anciennes Coutumes de Bretagne (Monteil, *ubi sup.*).

who, by the very act, were branded with infamy if successful in justifying innocence, and if defeated were mutilated or hanged.[1] By the codes in force throughout Germany in the thirteenth and fourteenth centuries, they were not only, in common with bastards, actors, and jugglers, deprived of all legal privileges, such as succeeding to property, bearing witness, etc., but even their children were visited with the same disabilities.[2] The utter contempt in which they were held was moreover quaintly symbolized in the same codes by the provisions of a tariff of damages to be assessed for blows and other personal injuries. A graduated list of fines is given for such insults offered to nobles, merchants, peasants, etc., in compensation of their wounded honor; below the serf come the mountebank and juggler, who could only cuff the assailant's shadow projected on the wall; and last of all are rated the champion and his children, whose only redress was a glance of sunshine cast upon them by the offender from a duelling shield. Deemed by law incapable of receiving an insult, the satisfaction awarded was as illusory as the honor to be repaired.[3] That this poetical justice was long in vogue is proved by the commentary upon it in the Richstich Landrecht, of which the

[1] Johen de Beaumont dit que chanpions loiez, prové de tel chose, ne puet home apelier á gage de bataille an nul quas, si n'est por chanpion loiez por sa deffansse; car la poine de sa mauvese vie le doit bien en ce punir.—Livres de Jostice et de Plet, Liv. XIX. Tit. ii. § 4.

[2] Campiones et eorum liberi (ita nati) et omnes qui illegitime nati sunt, et omnes qui furti aut pleni latrocinii nomine satisfecere, aut fustigationem sustinuere, hi omnes juris beneficiis carent.—Jur. Provin. Alaman. cap. xxxvi. § 2 (Ed. Schilter.).—Jur. Provin. Saxon. Lib. III. c. xlv.

[3] Campionibus et ipsorum liberis emendæ loco datur fulgur ex clypeo nitido, qui soli obvertitur, ortum; hoc is qui eis satisfactionem debet loco emendæ præstare tenetur (Jur. Prov. Alaman. cap. cccv. § 15.—Jur. Provin. Saxon. Lib. III. art. xlv.). In the French version of the Speculum Suevicum, these emblematic measures of damage are followed by the remark "cestes emandes furent establies an la vieillie loy per les roys" (P. II. c. lxxxvi.), which would appear to show that they were disused in the territories for which the translation was made.

date is shown to be not earlier than the close of the fourteenth century, by an allusion in the same chapter to accidental deaths arising from the use of firearms.[1]

The Italians, however, took a more sensible and practical view of the matter. Accepting as a necessity the existence of champions as a class, they were disposed rather to elevate than to degrade the profession. The law required that they should not be criminals or infamous, and the fact that they fought for hire did not render them so.[2] In the Veronese code of 1228, they appear as an established institution, consisting of individuals selected and appointed by the magistrates, who did not allow them to receive more than one hundred sous for the performance of their office.[3]

It is evident that the evils attendant upon the employment of champions were generally recognized, and it is not singular that efforts were occasionally made to abrogate or limit the practice. Otho II., whose laws did so much to give respectability to the duel, decreed that champions should be permitted only to counts, ecclesiastics, women, boys, old men, and cripples.[4] That this rule was strictly enforced in some places we may infer from the pleadings of a case occurring in 1010 before the Bishop of Arezzo, concerning a disputed property, wherein a crippled right hand is alleged as the reason for allowing a champion to one of the parties.[5] In other parts of Italy, however, the regulation must have been speedily disregarded, for about the same period Henry II. found it necessary to promulgate a law forbidding the employment of substitutes to able-bodied defendants in cases of parricide or of aggravated murder;[6] and when, two hundred years later, Frederic II. almost abolished the judicial combat in his

[1] Richstich Landrecht, Lib. II. cap. xxv.

[2] Odofredi Summa de Pugna c. v. (Patetta, p. 489).

[3] Lib. Juris Civilis Veron. cap. 125, 126 (Veronæ, 1728, p. 95).

[4] L. Longobard. Lib. II. Tit. lv. §§ 38, 40.

[5] Muratori, Antiq. Ital. Dissert. 39.

[6] L. Longobard. Lib. I. Tit. ix. § 37; Tit. x. § 4.

Neapolitan dominions, we may fairly presume from one of his remarks that champions were universally employed.[1] Indeed, he made provision for supplying them at the public expense to widows, orphans, and paupers who might be unable to secure for themselves such assistance.[2] In Germany, early in the eleventh century, it would seem that champions were a matter of course, from the expressions made use of in describing the execution of a number of robbers convicted in this manner at Merseburg in 1017.[3] At a later period, it seems probable, from a comparison of two chapters of the Suabian laws, that efforts were made to prevent the hiring of professional gladiators,[4] and in the Saxon burgher laws a man could refuse the duel if he could prove that his antagonist was a champion serving for pay.[5] That these efforts to restrict the practice, however, were attended with little success may be inferred from the disabilities which were so copiously showered on the class by the same laws.

In England, where, as we have seen, the identity of champions and witnesses was clearly asserted, there were prolonged efforts to suppress their hiring. In 1150, Henry II. strictly prohibited the wager of battle with hired champions in his Norman territories;[6] although the Norman custom not only admitted them but required the principal to pay the full sum agreed upon to his champion whether defeated or not.[7] We learn from Glanville that a champion suspected of serving for money might be objected to by the opposite party, whence arose a secondary combat to determine his fitness for the

[1] Vix enim aut nunquam duo pugiles inveniri poterunt sic æquales, etc.—Constit. Sicular. Lib. II. Tit. xxxiii.

[2] Ibid. Lib. I. Tit. xxxîii.

[3] Ibi tunc multi latrones a gladiatoribus singulari certamine devicti, suspendio perierunt.—Dithmari. Chron. Lib. VII.

[4] Jur. Provin. Alaman. cap. xxxvi. § 2; cap. lx. § 1.

[5] Sachsische Weichbild, c. lxxxii. § 3.

[6] Concil. Eccles. Rotomag. p. 128 (Du Cange).

[7] Cod. Leg. Norman. P. II. c. lxiv. § 19 (Ludewig. VII. 416).

primary one.[1] Bracton, moreover, develops this by asserting as a rule that a witness suspected of being a hired champion was not allowed to proceed to the combat, but was tried for the attempt by a jury, and if convicted suffered the penalty of perjury in the loss of a hand or a foot,[2] and in another passage he states that hired champions were not permitted.[3] How far these rules were enforced it would now be difficult to determine. Records show that a frequent defence against an adverse witness was an offer to prove that he was a hired champion.[4] On the other hand, the payment of champions was frequent and no concealment seems to have been thought necessary concerning it. Towards the close of the twelfth century, by a charter Stephen de Nerbana grants two *virgata* of land to William son of Ralph "propter duellum quod fecit pro me."[5] In another charter of Bracton's date John "quondam porcarius de Coldingham" grants to the Priory of Coldingham a tract of land which he had received from Adam de Riston in payment for victoriously fighting a duel for him.[6]

[1] De Leg. Angliæ Lib. II. cap. iii.

[2] Bracton, Lib. III. Tract. ii. cap. 32 § 7.

[3] Ibid. c. 18 § 4.

[4] See a case in which Ralph Rusdike, a witness, offers battle against Elias of Dumbleton—"et Elias defendit totum versus eum ut versus campionem conductitium et villanus." Then Ralph shows that he has an interest in the matter which warrants his acting as appellor and battle is gaged. —Maitland's Select Pleas of the Crown, Vol. I. p. 80. Also another case in 1220 in which the appellant offers a silver mark to the king for opportunity to prove that an adverse witness is a hired champion.—Ib. p. 124. Another case in 1220 (p. 137) shows how customary it was to impugn an adverse witness as a hired champion.

[5] Neilson's Trial by Combat, p. 49.

[6] This charter, which has recently been found among the records of Durham Cathedral, is printed in the London *Athenæum* of November 10th, 1866. It is not dated, but the names of the subscribing witnesses show that it must have been executed about the year 1260.

I owe to James Clephan, Esq., of Newcastle-on-Tyne, the interesting fact that the Sherburn Hospital, Durham, is still in possession of the vill of Garmondsway which was bestowed upon it in the latter half of the twelfth

Even more significant are the formal agreements with champions, such as that by which in 1276 Bishop Swinefeld declares to all men that he has appointed Thomas of Brydges his champion, on a salary of 6s. 8d. per annum, so long as he shall be able to fight, with extra compensation in case he is called upon to perform his functions.[1] Eventually, as we have seen (p. 183), in civil cases, both parties were compelled by law to employ champions, which presupposes, as a matter of course, that in a great majority of instances the substitutes must have been hired.[2] In criminal cases there seems to have been a compromise; in felonies, the defendant was obliged to appear personally, while in accusations of less moment he was at liberty to put forward a witness as champion;[3] and when the appellant, from sex or other disability, or the defendant from age, was unable to undergo the combat personally, it was forbidden, and the case was decided by a jury.[4] By the Scottish law of the thirteenth century, it is evident that champions were not allowed in any case, since those disabled by age or wounds were forced to undergo the ordeal in order to escape the duel.[5] This strictness became relaxed in time, though the practice of employing champions seems never to have received much encouragement. By a law of Alexander II., about the

century by Ralph, son of Paulinus of York, who had obtained it as the result of a judicial combat between his champion and that of the opposing claimants.

[1] Neilson, Trial by Combat, p. 51.

[2] Lord Eldon, in his speech advocating the abolition of trial by battle, in 1819, stated, "In these the parties were not suffered to fight *in propria persona*—they were compelled to confide their interests to champions, on the principle that if one of the parties were slain, the suit would abate."—Campbell's Lives of the Chancellors, VII. 279.

[3] Pur felony ne poit nul combattre pur autre; en personal actions nequidant venials, list aux actors de faire les battailes per lour corps ou per loyal tesmoigne come en droit reals sont les combats.—Horne's Myrror of Justicé, cap. iii. sect. 23.

[4] Bracton. Lib. III. Tract. ii. cap. 21, §§ 11, 12.—Ibid. cap. 24.

[5] Regiam Majestatem, Lib. IV. cap. iii.

year 1250, it appears that a noble had the privilege of putting forward a substitute; but if a peasant challenged a noble, he was obliged to appear personally, unless his lord undertook the quarrel for him and presented the champion as from himself.[1]

The tendency exhibited by the English law in distinguishing between civil and criminal cases is also manifested elsewhere. Thus, in France and the Frankish kingdoms of the East, there were limitations placed by law on the employment of champions in prosecutions for crime,[2] while in civil actions there appear to have been, at least in France, no restrictions whatever.[3] This distinction between civil and criminal practice is very clearly enunciated by Pierre de Fontaines, who states that in appeal of judgment the appellant in criminal cases is bound to show satisfactory cause for employing a champion, while in civil affairs the right to do so requires no argument.[4] In practice, however, it is doubtful whether there was any effectual bar to their use in any case, for the Monk of St. Denis, in praising St. Louis for suppressing the battle-trial, gives as one of the benefits of its abrogation, the removal of the abuse by which a rich man could buy all the champions of the vicinity, so that a poorer antagonist had no resource to avoid the loss of life or heritage.[5] This hiring of champions, moreover, was legally recognized as a necessity attendant upon the privilege of employing them.[6] High rank, or a marked differ-

[1] Neilson's Trial by Combat, p. 115. By the Burgher laws of Scotland, a man who was incapacitated by reason of age from appearing in the field, was allowed to defend himself with twelve conjurators.—L. Burgor. cap. xxiv. §§ 1, 2.

[2] Assises de Jerusalem, Baisse Court, cap. 145, 146.—Beaumanoir, cap. lxi. § 6; cap. lxii. § 4.

[3] Beaumanoir, cap. lxi. § 14.

[4] Conseil, chap. XXII. Tit. xiii.

[5] Grandes Chroniques T. IV. p. 427.

[6] Il est usage que se aucun demende la cort de bataille qui est juege par champions loées, il la tendra le jor maimes, et si ele est par le cors des quereléors il metra jor avenant à la tenir autre que celui.—Coutumes d'Anjou, XIII.e Siècle, § 74.

ence between the station of parties to an action, was also admitted as justifying the superior in putting forward a champion in his place.[1] Local variations, however, are observable in the customs regulating these matters. Thus the municipal laws of Reims, in the fourteenth century, not only restrict the admission of champions in criminal matters to cases in which age or physical disability may incapacitate the principals from personally taking part in the combat, but also require the accused to swear that the impediment has supervened since the date of the alleged offence; and even this was of no avail if the prosecutor had included in his appeal of battle an assertion that such disability had existed at the time specified.[2] Witnesses obliged to support their testimony by the duel were not only subject to the same restrictions, but in substituting a hired gladiator were obliged to swear that they had vainly sought among their friends for some one to assume the office voluntarily.[3] The whole tenor of these provisions, indeed, manifests a decided intention to surround the employment of champions with every practicable impediment. In Béarn, again, the appellant in cases of treason had a right to decide whether the defendant should be allowed to put forward a substitute, and from the expressions in the text it may be inferred that in the selection of champions there was an endeavor to secure equality of age, size, and strength.[4] This equalization of chances was thoroughly carried out in Italy, where the law required them to be selected with that view.[5]

[1] Kar haute persone doit bien metre por lui, à deffendre soi, home, honeste persone, se l'an l'apele, ou s'il apele autre.—Livres de Jostice et de Plet, Liv. II. Tit. xviii.

[2] Lib. Pract. de Consuet. Remens. § 40 (Archives Législ. de Reims, Pt. I. p. 40).

[3] Ibid. § 14, p. 37.

[4] For de Morlaas, Rubr. liii. art. 188.

[5] Quando pugna debet fieri per campionem debet fieri eorum equa distributio . . . et etiam jure longobardo cavetur quod pugna debet fieri per similes campiones.—Odofredi Summa de Pugna c. iv. (Patetta, p. 488).

Thus in the Veronese code of 1228, where, as has been seen, the champions were a recognized body, regulated and controlled by the state, no one could engage a champion before a duel had been judicially decreed. Then the magistrate was bound to choose gladiators of equal prowess, and the choice between them was given to the defendant; an arrangement which rendered the mutilation inflicted on the vanquished combatant only justifiable on the score of suspected treachery.[1] A Bolognese regulation of the thirteenth century was even fairer, and reduced the combat to an affair of chance in which the judgment of God had the fullest scope, for when the champions were in the lists a child placed inside of the garments of each a card bearing the name of his principal, and until the combat was ended no one knew which of them represented the plaintiff and which the defendant.[2] In Bigorre, the only restriction seems to have been that champions should be natives and not foreigners, and their payment was recognized as a matter of course.[3] By the Spanish law of the thirteenth century, the employment of champions was so restricted as to show an evident desire on the part of the legislator to discourage it as far as possible. The defendant had the right to send a substitute into the field, but the appellant could do so only by consent of his adversary. The champion was required to be of birth equal to his principal, which rendered the hiring of champions almost impossible, and not superior to him in force and vigor. Women and minors appeared by their next of kin, and ecclesiastics by their advocates.[4] In Russia, until the sixteenth century, champions were never employed, contestants being always obliged to appear in person. In 1550,

[1] L. Jur. Civilis Veronæ cap. 125, 126 (p. 95).

[2] Patetta, Le Ordalie, pp. 427–9.

[3] Pugiles in Bigorra non nisi indigenæ recipiantur (Lagrèze, Hist. du Droit dans les Pyrénées, p. 251). By the same code, the tariff of payment to the champion was 20 sous, with 12 for his shield and 6 for training—"pro præparatione."

[4] Las Siete Partidas, Pt. VII. Tit. iv. l. 3.

the code known as the Sudebtnick at length permitted the employment of champions in certain cases.[1]

There were two classes of pleaders, however, with whom the hiring of champions was a necessity, and who could not be bound by the limitations imposed on ordinary litigants. While the sexagenary, the infant, and the crippled might possibly find a representative among their kindred, and while the woman might appear by her husband or next of kin, the ecclesiastical foundations and chartered towns had no such resource. Thus, in a suit for taxes, in 1164, before the court of Verona, Bonuszeno of Soavo proved that the village of Soavo had exempted his father Petrobatalla from all local imposts for having served as champion in a duel between it and a neighboring community, and his claim to the reversion of the exemption was allowed.[2] So a charter of 1104 relates how the monks of Noailles were harassed by the seizure of some mills belonging to their abbey, claimed by an official of William Duke of Aquitaine, until at length the duke agreed to allow the matter to be decided by the duel, when the champion of the church was victorious and the disputed property was confirmed to the abbey.[3] At length the frequent necessity for this species of service led to the employment of regularly appointed champions, who fought the battles of their principals for an annual stipend, or for some other advantages bestowed in payment. Du Cange, for instance, gives the text of an agreement by which one Geoffry Blondel, in 1256, bound himself to the town of Beauvais as its champion for a yearly salary of twenty sous Parisis, with extra gratifications of ten livres Tournois every time that he appeared in arms to defend its cause, fifty livres if blows were exchanged, and a hundred livres if the combat were carried to a triumphant issue. It is

[1] Du Boys, Droit Criminel des Peuples Modernes, I. 611–13.

[2] Campagnola, Lib. Juris Civ. Veronæ (Veronæ, 1728, p. xviii).

[3] Polyptichum Irminonis, App. No. 33 (Paris, 1836, p. 372).

a little singular that Beaumanoir, in digesting the customs of Beauvais but a few years later, speaks of this practice as an ancient and obsolete one, of which he had only heard through tradition.[1] That it continued to be in vogue until long after, is shown by Monteil, who alludes to several documents of the kind, bearing date as late as the fifteenth century.[2]

As a rule, ecclesiastical communities were likewise under the necessity of employing champions to defend their rights. Sometimes, as we have seen, these were hired, and were of no better character than those of common pleaders. They seem to have been well paid if we may judge from an agreement of 1258 between the Abbey of Glastonbury and Henry de Fernbureg, by which the latter bound himself to defend by battle the rights of the abbey to certain manors against the Bishop of Bath and Wells, for which he is to receive thirty sterling marks, of which ten are to be paid when battle is gaged, five when he is shaved for the combat, and on the day of the duel fifteen are to be placed in the hands of a third party to be paid over to him if he strikes a single blow.[3] Sometimes, however, gentlemen did not disdain to serve God by fighting for the Church in special cases, as when, so late as the middle of the fourteenth century, the priory of Tynemouth had a suit with a troublesome neighbor, Gerard de Widdrington, over the manor of Hawkshaw, and Sir Thomas Colville, who had won great renown in the French wars, appeared in court as its champion and offered the combat. No one could be found hardy enough to accept his challenge

[1] Une malvese coustume souloit courre anciemment, si comme nos avons entendu des seigneurs de lois.—Cout. du Beauvoisis, cap. xxxviii. § 15.

[2] Hist. des Français, XV^e^ Siècle, Hist. xiii.—The tariff of rewards paid to Blondel, and Beaumanoir's argument in favor of mutilating a defeated champion, offer a strong practical commentary on the fundamental principles upon which the whole system of appeals to the judgment of God was based—that success was an evidence of right.

[3] Bysshe's notes to Upton's De Studio Militari, p. 36.

and the manor was adjudged to the priory.[1] There was, moreover, another class of champions of the Church who occupied a distinguished position, and were bound to defend the interests of their clients in the field as well as in the court and in the lists; they also led the armed retainers of the church when summoned by the suzerain to national war. The office was honorable and lucrative, and was eagerly sought by gentlemen of station, who turned to account the opportunities of aggrandizement which it afforded; and many a noble family traced its prosperity to the increase of ancestral property thus obtained, directly or indirectly, by espousing the cause of fat abbeys and wealthy bishoprics, as when, in the ninth century, the Abbot of Figeac, near Cahors, bestowed on a neighboring lord sixty churches and five hundred mansi on condition of his fighting the battles of the abbey.[2] The influence of feudalism early made itself felt, and the office of *Vidame* or *Avoué* became generally hereditary, after which its possessors, for the most part, rendered themselves independent of their benefactors, their exactions and spoliations becoming a favorite theme of objurgation among churchmen, who regarded them as the worst enemies of the foundations which they had sworn to protect.[3] In many instances the position was a consideration obtained for donations bestowed upon churches, so that in some countries, and particularly in England, the title of *advocatus* became gradually recognized as synonymous with patron. Thus, one of the worst abuses of the Anglican Church is derived from this source, and the forgotten wrongs of the Middle Ages are perpetuated, etymologically at least, in the advowson which renders the cure of souls too often a matter of bargain and sale.

[1] Neilson's Trial by Combat, p. 150.

[2] Hist. Monast. Figeacens. (Baluz. et Mansi IV. p. 1).

[3] Abbonis Floriac. Collect. Canon. can. ii.—Histor. Trevirens. (D'Achery Spicileg. II. 223).—Gerohi Reichersperg. de Ædificio Dei cap. vi.

CHAPTER VIII.

DECLINE OF THE JUDICIAL COMBAT.

So many influences were at work in favor of the judicial duel, and it was so thoroughly engrafted in the convictions and prejudices of Europe, that centuries were requisite for its extirpation. Curiously enough, the earliest decisive action against it took place in Iceland, where it was formally interdicted as a judicial proceeding in 1011;[1] and though the assumption that this was owing to the introduction of Christianity has been disproved, still, the fact that both events were contemporaneous allows us to conclude that some influence may have been exercised by even so imperfect a religion as that taught to the new converts, though the immediate cause was a *holmgang* between two skalds of distinction, Gunnlaug Ormstunga and Skald-Rafn.[2] Norway was not long in following the example, for about the same period the Jarls Erik and Sven Hakonsen abolished the *holmgang*, while paganism was as yet widely prevalent.[3] Denmark was almost equally prompt: indeed Saxo Grammaticus

[1] Schlegel Comment. ad Grágás, p. xxii.—Dasent, in his Icelandic Chronology (Burnt Njal, I. cciii.), places this in 1006, and Keyser (Religion of the Northmen, Pennock's Trans. p. 258) in 1000.

[2] The kind of Christianity introduced may be estimated by the character of the Apostle of Iceland. Deacon Thangbrand was the son of Willibald Count of Saxony, and even after he had taken orders continued to ply his old vocation of viking or sea robbing. To get rid of him and to punish him, King Olaf Tryggvesson of Norway imposed upon him the task of converting Iceland, which he accomplished with the sword in one hand and the Bible in the other.—See Dasent, Burnt Njal, II. 361.—Olaf Tryggvesson's Saga c. lxxx. (Laing's Heimskringla, I. 441).

[3] Keyser, op. cit. p. 258.

in one passage attributes to it the priority, asserting that when Poppo, in 965, converted Harold Blaatand by the ordeal of red-hot iron, it produced so powerful an effect as to induce the substitution of that mode of trial for the previously existing wager of battle.[1] Yet it evidently was not abolished for a century later, for when Harold the Simple, son of Sven Estrith, ascended the throne in 1074, among the legal innovations which he introduced was the substitution of the purgatorial oath for all other forms of defence, which, as Saxo specifically states, put an end to the wager of battle, and opened the door to great abuses.[2]

Fiercer tribes than these in Europe there were none, and their abrogation of the battle trial at this early age is an inexplicable anomaly. It was an exceptional movement, however, without results beyond their own narrow boundaries. Other causes had to work slowly and painfully for ages before man could throw off the bonds of ancestral prejudice. One of the most powerful of these causes was the gradual rise of the Tiers-État to consideration and importance. The sturdy bourgeois, though ready enough with morion and pike to defend their privileges, were usually addicted to a more peaceful mode of settling private quarrels. Devoted to the arts of peace, seeing their interest in the pursuits of industry and commerce, enjoying the advantage of settled and permanent tribunals, and exposed to all the humanizing and civilizing influences of close association in communities, they speedily acquired ideas of progress very different from those of the savage feudal nobles living isolated in their fastnesses, or of the wretched serfs who crouched for protection around the castles of their masters. Accordingly, the desire to escape from the necessity of purgation by battle is almost coeval with the founding of the first communes. The earliest instance of this tendency that I have met with is contained in the charter granted to Pisa by the Emperor Henry IV. in 1081, by which

[1] Saxon. Grammat. Hist. Dan. Lib. x. [2] Ibid. Lib. xi.

he agrees that any accusations which he may bring against citizens can be tried without battle by the oaths of twelve compurgators, except when the penalties of death or mutilation are involved; and in questions concerning land, the duel is forbidden when competent testimony can be procured.[1] Limited as these concessions may seem, they were an immense innovation on the prejudices of the age, and are important as affording the earliest indication of the direction which the new civilization was assuming. More comprehensive was the privilege granted soon afterwards by Henry I. to the citizens of London, by which he released them wholly from the duel, and this was followed by similar exemptions during the twelfth century bestowed on one town after another; but it was not till near the end of the century that in Scotland William the Lion granted the first charter of this kind to Inverness.[2] About the year 1105, the citizens of Amiens received a charter from their bishop, St. Godfrey, in which the duel is subjected to some restriction—not enough in itself, perhaps, to effect much reform, yet clearly showing the tendency which existed. According to the terms of this charter no duel could be decreed concerning any agreement entered into before two or three magistrates if they could bear witness to its terms.[3] One of the earliest instances of absolute freedom from the judicial combat occurs in a charter granted to the town of Ypres, in 1116 by Baldwin VII. of Flanders, when he substituted the oath with four conjurators in all cases where the duel or the ordeal was previously in use.[4] This was followed by a similar grant to the inhabitants of Bari by Roger, King

[1] Lünig Cod. Diplom. Ital. I. 2455.—The liberal terms of this charter show the enlightenment of the Emperor, and explain the fidelity manifested for him by the imperial cities in his desperate struggles with his rebellious nobles and an implacable papacy.

[2] Neilson's Trial by Combat, pp. 33, 65, 97.

[3] Chart. Commun. Ambianens. c. 44 (Migne's Patrolog. T. 162, p. 750).

[4] The charter is given by Proost, op. cit. p. 96.

of Naples, in 1132.[1] Curiously enough, almost contemporary with this is a similar exemption bestowed on the rude mountaineers of the Pyrenees. Centulla I. of Bigorre, who died in 1138, in the Privileges of Lourdes, authorizes the inhabitants to prosecute their claims without the duel;[2] and his desire to discourage the custom is further shown by a clause permitting the pleader who has gaged his battle to withdraw on payment of a fine of only five sous to the seigneur, in addition to what the authorities of the town may levy.[3] Still more decided was a provision of the laws of Soest in Westphalia, somewhat earlier than this, by which the citizens were absolutely prohibited from appealing each other in battle;[4] and this is also to be found in a charter granted to the town of Tournay by Philip Augustus in 1187, though in the latter the cold water ordeal is prescribed for cases of murder and of wounding by night.[5] In the laws of Ghent, granted by Philip of Alsace in 1178, there is no allusion to any species of ordeal, and all proceedings seem to be based on the ordinary processes of law, while in the charter of Nieuport, bestowed by the same prince in 1163, although the ordeal of red-hot iron and compurgatorial oaths are freely alluded to as means of rebutting accusations, there is no reference whatever to the battle trial, showing that it must then have been no longer in use.[6] The charters granted to Medina de Pomar in 1219 by Fernando III. of Castile, and to Treviño by Alfonso X. in 1254, provide that

[1] Ferrum, cacavum, pugnam, aquam, vobis non judicabit vel judicari faciet (Muratori, Antiq. Ital. Dissert. 38).

[2] Priviléges de Lourdes, cap. ii. (Lagrèze, op. cit. p. 482).

[3] Ibid., cap. xiii. (Lagrèze p. 484). These privileges were confirmed at various epochs, until 1407.

[4] Statuta Susatensia, No. 41 (Hæberlin Analect. Med. Ævi. p. 513). This is retained in the subsequent recension of the law, in the thirteenth century (Op. cit. p. 526).

[5] Consuetud. Tornacens. ann. 1187, §§ ii. iii. xxi (D'Achery Spicileg. III. 552).

[6] Oudegherst, Annales de Flandre ed. Lesbroussart. T. I. pp. 426 sqq.; T. II. not. ad. fin.

there shall be no trial by single combat.[1] Louis VIII. in the charter of Crespy, granted in 1223, promised that neither himself nor his officials should in future have the right to demand the wager of battle from its inhabitants;[2] and shortly after, the laws of Arques, conceded by the abbey of St. Bertin in 1231, provided that the duel could only be decreed between two citizens of that commune when both parties should assent to it.[3] In the same spirit the laws of Riom, granted by Alphonse de Poitiers, the son of St. Louis, in 1270, declared that no inhabitant of the town should be forced to submit to the wager of battle.[4] In the customs of Maubourguet, granted in 1309, by Bernard VI. of Armagnac, privileges similar to those of Lourdes, alluded to above, were included, rendering the duel a purely voluntary matter.[5] Even in Scotland, partial exemptions of the same kind in favor of towns are found as early as the twelfth century. A stranger could not force a burgher to fight, except on an accusation of treachery or theft, while, if a burgher desired to compel a stranger to the duel, he was obliged to go beyond the confines of the town. A special privilege was granted to the royal burghs, for their citizens could not be challenged by the burghers of nobles or prelates, while they had the right to offer battle to the latter.[6] Much more efficient was the clause of the third *Keure* of Bruges, granted in 1304 by Philip son of Count Guy of Flanders, which strictly prohibited the duel. Any one who

[1] Coleccion de Cédulas, etc., Madrid, 1830, Tom. VI. p. 142.—Memorial Histórico Español, Madrid, 1850, T. I. p. 47.

[2] Statuta Commun. apud Crispiacum (D'Achery Spicileg. III. 595).

[3] Legg. Villæ de Arkes § xxxi. (Ibid. p. 608).

[4] Libertates Villæ Ricomag. § 6 (Ibid. p. 671).

[5] E sobre ayso que dam e autreyam als borges de la vielle de Maubourguet que totz los embars pusquen provar sens batalhe, etc.—Coutumes de Maubourguet, cap. v. That this, however, was not expected to do away entirely with the battle trial is shown by the regulation prescribed in cap. xxxvii. (Lagrèze, op. cit. pp. 470, 474).

[6] L. Burgorum, c. 14, 15 (Skene).

gave or received a wager of battle was fined sixty sols, one-half for the benefit of the town, and the other for the count.[1]

The special influence exercised by the practical spirit of trade in rendering the duel obsolete is well illustrated by the privilege granted, in 1127, by William Clito, to the merchants of St. Omer, declaring that they should be free from all appeals to single combat in all the markets of Flanders.[2] In a similar spirit, when Frederic Barbarossa, in 1173, was desirous of attracting to the markets of Aix-la-Chapelle and Duisbourg the traders of Flanders, in the code which he established for the protection of such as might come, he specially enacted that they should enjoy immunity from the duel.[3] Even Russia found it advantageous to extend the same exemption to foreign merchants, and in the treaty which Mstislas Davidovich made in 1228 with the Hanse-town of Riga, he granted to the Germans who might seek his dominions immunity from liability to the red-hot iron ordeal and wager of battle.[4]

Germany seems to have been somewhat later than France or Italy in the movement, yet her burghers evidently regarded it with favor. Frederic II., who recorded his disapproval of the duel in his Sicilian Constitutions, was ready to encourage them in this tendency, and in his charters to Ratisbon and Vienna he authorized their citizens to decline the duel and clear themselves by compurgation,[5] while as early as 1219 he exempted the Nürnbergers from the appeal of battle throughout the empire.[6] The burgher law of Northern Germany alludes to the judicial combat only in criminal charges, such

[1] Warnkönig, Hist. de la Flandre, IV. 129.

[2] In omni mercato Flandriæ si quis clamorem adversus eos suscitaverit, judicium scabinorum de omni clamore sine duello subeant; ab duello vero ulterius liberi sint.—Warnkönig. Hist. de la Flandre, II. 411.

[3] Nemo mercatorem de Flandria duello provocabit (Ibid. II. 426).

[4] Traité de 1228, art. 3 (Esneaux, Hist. de Russie, II. 272).

[5] Belitz de Duellis Germanorum, p. 9. Vitembergæ, 1717.

[6] Constit. Frid II. de Jur. Norimb. § 4 (Goldast. Constit. Imp. I. 291).

as violence, homicide, housebreaking, and theft;[1] and this is limited in the statutes of Eisenach, of 1283, which provide that no duel shall be adjudged in the town, except in cases of homicide, and then only when the hand of the murdered man shall be produced in court at the trial.[2] In 1291, Rodolph of Hapsburg issued a constitution declaring that the burghers of the free imperial cities should not be liable to the duel outside of the limits of their individual towns,[3] and in the Kayser-Recht this privilege is extended by declaring the burghers exempt from all challenge to combat, except in a suit brought by a fellow-citizen.[4] Notwithstanding this, special immunities continued to be granted, showing that these general laws were of little effect unless supported by the temper of the people. Thus Louis IV. in 1332 gave such a privilege to Dortmund, and so late as 1355 Charles IV. bestowed it on the citizens of Worms.[5]

A somewhat noteworthy exception to this tendency on the part of the municipalities is to be found in Moravia. There, under the laws of Ottokar Premizlas, in 1229 the duel was forbidden between natives and only allowed when one of the parties was a foreigner. Yet his son Wenceslas, some years later, confirmed the customs of the town of Iglau, in which the duel was a recognized feature enforced by an ascending scale of fines. If the accused compounded with the prosecutor before the duel was ordered he paid the judge one mark; after it was adjudged, two marks; after the lists were entered, three marks;

[1] Sachsische Weichbild, Art. xxxv. lxxii. lxxxi.–lxxxiv. lxxxix. xc. xcii. cxiv.

[2] Henke, Gesch. des Deut. Peinlichen Rechts I. 192 (Du Boys, op. cit. II. 590).

[3] Goldast. op. cit. I. 314.

[4] Jur. Cæsar. P. IV. cap. i. (Senckenberg Corp. Jur. German. I. 118). This portion of the Kayser-Recht is probably therefore posterior to the rise of the Hapsburg dynasty.

[5] Belitz de Duel. German. p. 11.

after weapons were taken, four marks; and if he waited till the weapons were drawn he had to pay five marks.[1]

All these were local regulations which had no direct bearing on general legislation, except in so far as they might assist in softening the manners of their generation and aiding in the general spread of civilization. A more efficient cause was to be found in the opposition of the Church. From Liutprand the Lombard to Frederic II., a period of five centuries, no secular lawgiver, south of Denmark, seems to have thought of abolishing the judicial combat as a measure of general policy, and those whose influence was largest were the most conspicuous in fostering it. During the whole of this period the Church was consistently engaged in discrediting it, notwithstanding that the local interests or pride of individual prelates might lead them to defend the vested privileges connected with it in their jurisdictions.

When King Gundobald gave form and shape to the battle ordeal in digesting the Burgundian laws, Avitus, Bishop of Vienne, remonstrated loudly against the practice as unjust and unchristian. A new controversy arose on the occasion of the duel between the Counts Bera and Sanila, to which allusion has already been made as one of the important events in the reign of Louis le Débonnaire. St. Agobard, Archbishop of Lyons, took advantage of the opportunity to address to the Emperor a treatise in which he strongly deprecated the settlement of judicial questions by the sword; and he subsequently wrote another tract against ordeals in general, consisting principally of scriptural texts with a running commentary, proving the incompatibility of Christian doctrines with these unchristian practices.[2] Some thirty-five years later the Council of

[1] Jura Primæva Moraviæ, Brunæ, 1781, pp. 33, 102.

[2] "Liber adversus Legem Gundobadi" and "Liber contra Judicium Dei" (Agobardi Opp. Ed. Baluz I. 107, 301). Both of these works display marked ability, and a spirit of enlightened piety, mingled with frequent absurdities which show that Agobard could not in all things rise

Valence, in 855, denounced the wager of battle in the most decided terms, praying the Emperor Lothair to abolish it throughout his dominions, and adopting a canon which not only excommunicated the victor in such contests, but refused the rights of Christian sepulture to the victim.[1] By this time the forces of the church were becoming consolidated in the papacy, and the Vicegerent of God was beginning to make his voice heard authoritatively throughout Europe. The popes accordingly were not long in protesting energetically against the custom. Nicholas I. denounced it vigorously as a tempting of God, unauthorized by divine law,[2] and his successors consistently endeavored, as we have already seen, to discredit it. In the latter half of the twelfth century, Peter Cantor argues that a champion undertaking the combat relies either on his superior strength and skill, which is manifest injustice; or on the justice of his cause, which is presumption; or on a special miracle, which is a devilish tempting of God.[3] Alexander III. decided that a cleric engaging in a duel, whether willingly or unwillingly, whether victor or vanquished, was subject to deposition, but that his bishop could grant him a dispensation provided there had been loss of neither life nor limb.[4] Towards the close of the century Celestine III. went further, and in the case of a priest who had put forward a champion who had slain his antagonist he decided that both principal and champion were guilty of homicide and the priest could no longer perform his functions, though he might have a dispensation to hold his benefice.[5] These cases suggest one of the reasons why the repeated papal prohibitions were so ineffective. The all-pervading venality of the Church of the period found in the dis-

superior to his age. One of his favorite arguments is that the battle ordeal was approved by the Arian heretic Gundobald, whom he stigmatizes as "quidam superbus ac stultus hæreticus Gundobadus Burgundionum rex."

[1] Concil. Valentin. ann. 855 can. 12.

C. 22 Decreti caus. II. q. v.

Pet. Cantor. Verb. Abbrev. cap. LXXVIII.

[4] C. 1 Extra Lib. v. Tit. xiv. [5] C. 2 Ibid.

pensing power an exhaustless source of profit, and dispensations for "irregularities" of all kinds were so habitually issued that the threatened punishments lost their terrors, and as Rome gradually absorbed the episcopal jurisdiction, offenders of all kinds knew that relief from the operation of the canons could always be had there. Some reason for setting them aside was never hard to find. In 1208 a canon of Bourges was elected prior; his disappointed competitor claimed that he was ineligible because he had once served as judge in a duel in which there was effusion of blood. Innocent III. was appealed to, who decided that the canon was capable of promotion to any dignity, and the chief reason alleged was that the evil custom of the duel was so universal in some regions that ecclesiastics of all classes from the lowest to the highest were habitually concerned in them.[1]

Innocent III., however, took care that the great council of Lateran in 1215 should confirm all the previous prohibitions of the practice.[2] It was probably this papal influence that led Simon de Montfort, the special champion of the church, to limit the use of the duel in the territories which he won in his crusade against the Count of Toulouse. In a charter given December 1, 1212, he forbids its use in all the seignorial courts in his dominions, except in cases of treason, theft, robbery, and murder.[3] De Montfort's dependence on Rome, however, was exceptional, and Christendom at large was not as yet prepared to appreciate the reformatory efforts of the popes. The most that the Council of Paris, held in 1212 for the reformation of the church by the cardinal-legate Robert de Curzon,

[1] Innocent. PP. III. Regest. XI. 64—Verum quoniam hujusmodi duellorum judicia juxta pravam quarundam consuetudinem regionum non solum a laicis seu clericis in minoribus ordinibus constitutis, sed etiam a majoribus ecclesiarum prælatis consueverunt, prout multorum assertione didicimus, exerceri.

[2] Concil. Lateranens. IV. can. 18.

[3] Consuetud. S. Montisfortis (Contre le Franc-Alleu sans Tiltre, p. 229).

could do was to order the bishops not to permit the duel in cemeteries or other sacred places.[1]

The opposition of the church as represented by its worthiest and most authoritative spokesmen continued. St. Ramon de Peñafort, the leading canonist of his time, about 1240, asserts uncompromisingly that all concerned in judicial combats are guilty of mortal sin; the sin is somewhat lightened indeed when the pleader is obliged to accept the combat by order of the judge, but the judge himself, the assessors who counsel it, and the priest who gives the benediction all sin most gravely; if death occurs they are all homicides and are rendered "irregular."[2] About the same time Alexander Hales ingeniously argued away the precedent of David and Goliath by showing that it was simply a prefiguration of the Passion, in which Christ triumphed over Satan as in a duel.[3] With the development, moreover, of the subtilties of scholastic theology the doctors found that the duel was less objectionable than the other forms of ordeal, because, as Thomas Aquinas remarks, the hot iron or boiling water is a direct tempting of God, while the duel is only a matter of chance, for no one expects miraculous interposition unless the champions are very unequal in age or strength.[4] This struck at the very root of the faith on which confidence in the battle ordeal was based, yet in spite of it the persistence of ecclesiastical belief in the divine interposition is fairly illustrated by a case, related with great triumph by monkish chroniclers, as late as the fourteenth century, when a duel was undertaken by direction of the Virgin Mary herself. In 1325, according to the story, a French Jew feigned conversion to Christianity in order to gratify his spleen by mutilating the images in the churches, and at length he committed the sacrilege of carrying off the holy wafer to aid

[1] Concil. Parisiens. ann. 1212, P. IV. c. xv. (Harduín. VI. II. 2017).

[2] S. Raymundi Summæ Lib. II. Tit. iii.—Cardinal Henry of Susa is equally uncompromising— Hostiensis Aureæ Summæ Lib. V. Tit. *De Cler. pugnant.*

[3] Alexandri de Ales Summæ P. III. Q. xlvi. Membr. 3.

[4] Sec. Sec. Q. 95 art. 8.

in the hideous rites of his fellows. The patience of the Virgin being at last exhausted, she appeared in a vision to a certain smith, commanding him to summon the impious Israelite to the field. A second and a third time was the vision repeated without effect, till at last the smith, on entering a church, was confronted by the Virgin in person, scolded for his remissness, promised an easy victory, and forbidden to pass the church door until his duty should be accomplished. He obeyed and sought the authorities. The duel was decreed, and the unhappy Hebrew, on being brought into the lists, yielded without a blow, falling on his knees, confessing his unpardonable sins, and crying that he could not resist the thousands of armed men who appeared around his adversary with threatening weapons. He was accordingly promptly burned, to the great satisfaction of all believers.[1]

Evidently the clergy at large did not second the reformatory efforts of their pontiffs. There was not only the ancestral belief implanted in the minds of those from among whom they were drawn, but the seignorial rights enjoyed by prelates and abbeys were not to be willingly abandoned. The progress of enlightenment was slow and the teachings of the papacy can only be enumerated as one of the factors at work to discredit the judicial duel.[2] We can estimate how deeply rooted were the

[1] Wilhelmi Fgmond. Chron. (Matthæi Analect. IV. 231). Proost (Législation des Jugements de Dieu, p. 16) gives this story, with some variations, as occurring at Mons, and states that the duel was authorized by no less a personage than Pope John XXII. Cornelius Zantfliet in his Chronicle (Martene Ampl. Collect. V. 182) locates it at Cambron in Hainault, and states that the Jew was a favorite of William Count of Hainault. Mr. Neilson informs me that Olivier de la Marche likewise adopts Cambron as the scene of the occurrence. The tale apparently was one which obtained wide currency.

[2] In 1374 Gregory XI. when condemning the Sachsenspiegel laid especial stress on the passages in which the judicial duel was prescribed (Sachsenspiegel, ed. Ludovici, 1720, p. 619). As late as 1492, the Synod of Schwerin promulgated a canon prohibiting Christian burial to those who fell in the duel or in tournaments.—Synod. Swerin. ann. 1492, Can. xxiv. (Hartzheim Concil. German. V. 647).

prejudices to be overcome when we find Dante seriously arguing that property acquired by the duel is justly acquired; that God may be relied upon to render the just cause triumphant; that it is wicked to doubt it, while it is folly to believe that a champion can be the weaker when God strengthens him.[1]

In its endeavors to suppress the judicial duel the Church had to weigh opposing difficulties. It could, as we have seen (p. 156), enjoin its members from taking part in such combats and from adjudging them in their jurisdictions; it could decree that priests became "irregular" if death ensued in duels where they gave the benediction, or perhaps even where they had only brought relics on which the combatants took the oaths. But over the secular courts it had only the power of persuasion, or at most of moral coercion, and among the canon doctors there was considerable discussion as to the extent to which it could pronounce participation in the duel a mortal sin, entailing excommunication and denial of the rites of sepulture. When a man sought the duel, when he demanded it of the judge and provoked his adversary to it, he could be pronounced guilty of homicide if death ensued. It was otherwise where an innocent man was accused of a mortal crime and would be hanged if he refused the duel adjudged to him by court. It was argued that the Church was a harsh mother if she forced her children thus to submit to death and infamy for a scruple of recent origin, raised merely by papal command, though the more rigid casuists insisted even on this. All agreed, however, that in civil cases a man ought rather to undergo the loss of his property than to imperil his soul and disobey the Church.[2]

Perhaps the most powerful cause at work was the revival of the Roman jurisprudence, which in the thirteenth century com-

[1] "Et si Deus adest nonne nefas est habendo justitiam succumbere posse? . . . Et si justitia in duello succumbere nequit, nonne de jure acquiritur quod per duellum acquiritur? . . . stultum enim est valde vires quas Deo comfortat inferiores in pugile suspicari."—De Monarchia II. 10 (Patetta, Le Ordalie, p. 415).

[2] Joh. Friburgens. Summæ Confessorum Lib. II. Tit. iii. Q. 3–5.

menced to undermine all the institutions of feudalism. Its theory of royal supremacy was most agreeable to sovereigns whose authority over powerful vassals was scarcely more than nominal; its perfection of equity between man and man could not fail to render it enticing to clear-minded jurists, wearied with the complicated and fantastic privileges of ecclesiastical, feudal, and customary law. Thus recommended, its progress was rapid. Monarchs lost no opportunity of inculcating respect for that which served their purpose so well, and the civil lawyers, who were their most useful instruments, speedily rose to be a power in the state. Of course the struggle was long, for feudalism had arisen from the necessities of the age, and a system on which were based all the existing institutions of Europe could only be attacked in detail, and could only be destroyed when the advance of civilization and the general diffusion of enlightenment had finally rendered it obsolete. The French Revolution was the final battle-field, and that terrible upheaval was requisite to obliterate a form of society whose existence had numbered nine hundred years.

The wager of battle was not long in experiencing the first assaults of the new power. The earliest efficient steps towards its abolition were taken in 1231 by the Emperor Frederic II. in his Neapolitan code. He pronounces it to be in no sense a legal proof, but only a species of divination, incompatible with every notion of equity and justice; and he prohibits it for the future, except in cases of poisoning or secret murder and treason where other proof is unattainable; and even in these it is placed at the option of the accuser alone; moreover, if the accuser commences by offering proof and fails he cannot then have recourse to combat; the accused must be acquitted.[1] The German Imperial code, known as the Kayser-Recht, which was probably compiled about the same time, contains a similar denunciation of the uncertainty of the duel, but does not

[1] Constit. Sicular. Lib. II. Tit. xxxii. xxxiii.—"Non tam vera probatio quam quædam divinatio ... . quæ naturæ non consonans, a jure communi deviat, æquitatis rationibus non consentit." Cf. Lib. I. Tit. xxi. cap. 2.

venture on a prohibition, merely renouncing all responsibility for it, while recognizing it as a settled custom.[1] In the portion, however, devoted to municipal law, which is probably somewhat later in date, the prohibition is much more stringently expressed, manifesting the influences at work ;[2] but even this is contradicted by a passage almost immediately preceding it. How little influence these wise counsels had, in a state so intensely feudal and aristocratic, is exemplified in the Suabian and Saxon codes, where the duel plays so important a part. Yet the desire to escape it was not altogether confined to the honest burghers of the cities, for in 1277 Rodolph of Hapsburg, even before he granted immunity to the imperial towns, gave a charter to the duchy of Styria, securing to the Styrians their privileges and rights, and in this he forbade the duel in all cases where sufficient testimony could be otherwise obtained ; while the general tenor of the document shows that this was regarded as a favor.[3] The Emperor Albert I. was no less desirous of restricting the duel, and in ordinary criminal cases endeavored to substitute compurgation.[4]

Still, as late as 1487, the Inquisitor Sprenger, in discountenancing the red-hot iron ordeal in witch-trials, feels himself obliged to meet the arguments of those who urged the lawfulness of the duel as a reason for permitting the cognate appeal to the ordeal. To this he naïvely replies, as Thomas Aquinas had done, that they are essentially different, as the champions in a duel are about equally matched, and the killing of one of them is a simple affair, while the iron ordeal, or that of drinking boiling water, is a tempting of God by

[1] Cum viderit innocentes in duello succubuisse, et sontes contra in sua iniustitia nihilominus victoriam obtinuisse. Et ideo in jura imperii scriptum est, ubi duo ex more in duellum procedunt, hoc non pertinet ad imperium.—Jur. Cæsar. P. II. c. 70 (Senckenberg I. 54).

[2] Quilibet sciat imperatorem jussisse ut nemo alterum ad duellum provocet. . . . Nemo enim unquam fortiores provocari vidit, sed semper debiliores, et fortiores semper triumpharunt.—Ibid. P. IV. cap. 19.

[3] Rudolphi I. Privileg. (Ludewig. Reliq. MSS. T. IV. p. 260).

[4] Goldast. Constitt. Imp. III. 446.

requiring a miracle.[1] This shows at the same time how thoroughly the judicial combat had degenerated from its original theory, and that the appeal to the God of battles had become a mere question of chance, or of the comparative strength and skill of a couple of professional bravos.

In Spain the influence of Roman institutions, transmitted through the Wisigothic laws, had allowed to the judicial duel less foothold than in other mediæval lands, and the process of suppressing it began early. In Aragon the chivalrous Jayme I., *el Conquistador*, in the franchises granted to Majorca, on its conquest in 1230, prohibited the judicial combat in both civil and criminal cases.[2] Within forty years from this, Alfonso the Wise of Castile issued the code generally known as Las Siete Partidas. In this he evidently desired to curb the practice as far as possible, stigmatizing it as a custom peculiar to the military class (*por lid de caballeros ò de peones*), and as reprehensible both as a tempting of God and as a source of perpetual injustice.[3] Accordingly, he subjected it to very important limitations. The wager of battle could only be granted by the king himself; it could only take place between gentlemen, and in personal actions alone which savored of treachery, such as murder, blows, or other dishonor, inflicted without warning or by surprise. Offences committed against property, burning, forcible seizure, and other wrongs, even without defiance, were specifically declared not subject to its decision, the body of the plaintiff being its only recognized justification.[4] Even in this limited sphere, the consent of both

[1] Malleus Maleficar. Francof. 1580, pp. 527–9.

[2] Villanueva, Viage Literario, XXII. 288.

[3] Los sabios antiguos que ficieron las leyes non lo tovieron por derecha prueba; ed esto por dos razones; la una porque muchas vegadas acaesce que en tales lides pierde la verdat e vence la mentira; la otra porque aquel que ha voluntad de se adventurar á esta prueba semeja que quiere tentar á Dios nuestro señor.—Partidas, P. III. Tit. xiv. l. 8.

[4] Ibid. P. VII. Tit. iii. l. 2, 3. According to Montalvo's edition of the Partidas (Sevilla, 1491), these laws were still in force under Ferdinand and Isabella.

parties was requisite, for the appellant could prosecute in the ordinarȳ legal manner, and the defendant, if challenged to battle, could elect to have the case tried by witnesses or inquest, nor could the king himself refuse him the right to do so.[1] When to this is added that a preliminary trial was requisite to decide whether the alleged offence was treacherous in its character or not, it will be seen that the combat was hedged around with such difficulties as rendered its presence on the statute book scarcely more than an unmeaning concession to popular prejudice; and if anything were wanting to prove the utter contempt of the legislator for the decisions of the battle-trial, it is to be found in the regulation that if the accused was killed on the field, without confessing the imputed crime, he was to be pronounced innocent, as one who had fallen in vindicating the truth.[2] The same desire to restrict the duel within the narrowest possible limits is shown in the rules concerning the employment of champions, which have been already alluded to. Although the Partidas as a scheme of legislation was not confirmed until the cortes of 1348 these provisions were lasting and produced the effect designed. It is true that in 1342 we hear of a combat ordered by Alfonso XI. between Pay Rodriguez de Ambia and Ruy Paez de Biedma, who mutually accused each other of treason. It was fought before the king and lasted for three days without either party obtaining the victory, till, on the evening of the third day, the king entered the lists and pacified the quarrel, saying that both antagonists could serve him better by fighting the Moors, with whom he was at war, than by killing each other.[3] Not long

[1] Tres dias débese acordar al reptado para escoger una de las tres maneras que desuso dixiemos, qual mas quisiere porque se libre el pleyto. . . . ca el re nin su corte non han de mandar lidiar por riepto.—Ibid. P. VII. Tit. iii. l. 4. Some changes were introduced in these details by subsequent ordinances.

[2] Muera quito del riepto; ca razon es que sea quito quien defendiendo la verdad recibió muerte.—Ibid. P. VII. Tit. iv. l. 4.

[3] Crónica de Alfonso el Onceno, cap. CCLXII.

afterwards Alfonso in the Ordenamiento de Alcalá, issued in 1348, repeated the restrictions of the Partidas, but in a very cursory manner, and rather incidently than directly, showing that the judicial combat was then a matter of little importance.[1] In fact, the jurisprudence of Spain was derived so directly from the Roman law through the Wisigothic code and its Romance recension, the Fuero Juzgo, that the wager of battle could never have become so deeply rooted in the national faith as among the more purely barbarian races. It was therefore more readily eradicated, and yet, as late as the sixteenth century, a case occurred in which the judicial duel was prescribed by Charles V., in whose presence the combat took place.[2]

The varying phases of the struggle between progress and centralization on the one side, and chivalry and feudalism on the other, were exceedingly well marked in France, and as the materials for tracing them are abundant, a more detailed account of the gradual reform may perhaps have interest, as illustrating the long and painful strife which has been necessary to evoke order and civilization out of the incongruous elements from which modern European society has sprung. The sagacity of St. Louis, so rarely at fault in the details of civil administration, saw in the duel not only an unchristian and unrighteous practice, but a symbol of the disorganizing feudalism which he so energetically labored to suppress. His temper led him rather to adopt pacific measures, in sapping by the forms of law the foundations of the feudal power, than to break it down by force of arms as his predecessors had attempted. The centralization of the Roman polity might well appear to him and his advisers the ideal of a well-ordered state, and the royal supremacy had by this time advanced to a point where the gradual extension of the judicial prerogatives of the crown might prove the surest mode of humbling eventually the haughty vassals who had so often bearded the

[1] Ordenamiento de Alcalá, Tit. XXXII. ll. vii.–xi. See also the Ordenanzas Reales of 1480, Lib. IV. Tit. ix.

[2] Meyer, Institutions Judiciaires, I. 337.

sovereign. No legal procedure was more closely connected with feudalism, or embodied its spirit more thoroughly, than the wager of battle, and Louis accordingly did all that lay in his power to abrogate the custom. The royal authority was strictly circumscribed, however, and though, in his celebrated Ordonnance of 1260, he formally prohibited the battle trial in the territory subject to his jurisdiction,[1] he was obliged to admit that he had no power to control the courts of his barons beyond the domains of the crown.[2] Even within this comparatively limited sphere, we may fairly assume from some passages in the Établissements, compiled about the year 1270, that he was unable to do away entirely with the practice. It is to be found permitted in some cases both civil and criminal, of peculiarly knotty character, admitting of no other apparent

[1] Nous deffendons à tous les batailles par tout nostre demengne, més nous n'ostons mie les clains, les respons, les convenants, etc. . . . fors que nous ostons les batailles, et en lieu des batailles nous meton prueves de tesmoins, et si n'oston pas les autres bones prueves et loyaux, qui ont esté en court laye siques à ore.—Isambert, I. 284.

Laurière (Tabl. des Ordonn. p. 17) alludes to an edict to the same purport, under date of 1240, of which I can nowhere else find a trace. There is no reference to it in the Tables des Ordonnances of Pardessus (Paris, 1847).

It is a curious illustration of the fluctuating policy of the contest that in his struggle to enforce the supremacy of the royal jurisdiction as against the prelates of the province of Reims, one of the complaints of the bishops at the Council of Saint-Quentin in 1235 is that he forced ecclesiastics in his court to prove by the duel their rights over their serfs—"Item, supplicat concilium quod dominus rex non compellat personas ecclesiasticas probare per duellum in curia sua homines quos dicunt suos esse de corpore suo" (Harduin. VII. 259).

[2] Se ce est hors l'obeissance le Roy, gage de bataille (Étab. de St. Louis, Liv. II. chap. xi. xxix. xxxviii.). Beaumanoir repeats it, a quarter of a century later, in the most precise terms, "Car tout cil qui ont justice en le conté poent maintenir lor cort, s'il lor plest, selonc l'ancienne coustume; et s'il lor plest il le poent tenir selonc l'establissement le Roy" (Cout. du Beauv. cap xxxix. § 21). And again, "Car quant li rois Loïs les osta de sa cort il ne les osta pas des cours à ses barons" (Cap. LXI. § 15).

solution.[1] It seems, indeed, remarkable that he should even have authorized personal combat between brothers, in criminal accusations, only restricting them in civil suits to fighting by champions,[2] when the German law of nearly the same period forbids the duel, like marriage, between relations in the fifth degree, and states that previously it had been prohibited to those connected in the seventh degree.[3]

Even this qualified reform provoked determined opposition. Every motive of pride and interest prompted resistance. The prejudices of birth, the strength of the feudal principle, the force of chivalric superstition, the pride of self-reliance gave keener edge to the apprehension of losing an assured source of revenue. The right of granting the wager of battle was one of those appertaining to the *hauts-justiciers*, and so highly was it esteemed that paintings of champions fighting frequently adorned their halls as emblems of their prerogatives; Loysel, indeed, deduces from it a maxim, "The pillory, the gibbet, the iron collar, and paintings of champions engaged, are marks of high jurisdiction."[4] This right had a considerable money value, for the seigneur at whose court an appeal of battle was tried received from the defeated party a fine of sixty livres if he was a gentleman, and sixty sous if a roturier, besides a

[1] Liv. I. chap. xxvii. xci. cxiii. etc. This is so entirely at variance with the general belief, and militates so strongly with the opening assertion of the Établissements (Ordonn. of 1260) that I should observe that in the chapters referred to the direction for the combat is absolute; no alternative is provided, and there is no allusion to any difference of practice prevailing in the royal courts and in those of the barons, such as may be seen in other passages (Liv. I. chap. xxxviii. lxxxi. cxi. etc.). Yet in a charter of 1263, Louis alludes to his having interdicted the duel in the domains of the crown in the most absolute manner.—"Sed quia duellum perpetuo de nostris domaniis duximus amovendum" (Actes du Parlement de Paris No. 818 A. T. I. p. 75, Paris, 1863).

[2] Établissements Liv. I. chap. clxvii.

[3] Jur. Provin. Alamann. cap. CLXXI. §§ 10, 11, 12.

[4] Pilori, échelle, carquant, et peintures de champions combattans sont marques de haute justice.—Instit. Coutum Liv. II. Tit. ii. Règle 47.

perquisite of the horses and arms employed, and heavy mulcts for any delays which might be asked,[1] besides fines from those who withdrew after the combat was decreed.[2] Nor was this all, for during the centuries of its existence there had grown and clustered around the custom an immeasurable mass of rights and privileges which struggled lustily against destruction. Thus, hardly had the ordonnance of prohibition been issued when, in 1260, a knight named Mathieu le Voyer actually brought suit against the king for the loss it inflicted upon him. He dolefully set forth that he enjoyed the privilege of guarding the lists in all duels adjudged in the royal court at Corbon, for which he was entitled to receive a fee of five sous in each case; and, as his occupation thus was gone, he claimed compensation, modestly suggesting that he be allowed the same tax on all inquests held under the new law.[3] How closely all such sources of revenue were watched is illustrated by a case occurring in 1286, when Philippe le Bel remitted the fines accruing to him from a duel between two squires adjudged in

[1] Beaumanoir, op. cit. chap. LXI. §§ 11, 12, 13.

In Normandy, these advantages were enjoyed by all seigneurs justiciers. "Tuit chevalier et tuit sergent ont en leurs terres leur justice de bataille en cause citeaine; et quant li champions sera vaincuz, il auront LX sols et I denier de la récréandise."—Etab. de Normandie (Ed. Marnier, p. 30). These minutely subdivided and parcelled out jurisdictions were one of the most prolific causes of debate during the middle ages, not only on account of the power and influence, but also from the profits derived from them. That the privilege of decreeing duels was not the least remunerative of these rights is well manifested by the decision of an inquest held during the reign of Philip Augustus to determine the conflicting jurisdictions of the ducal court of Normandy and of the seigneurs of Vernon. It will be found quoted in full by Beugnot in his notes on the Olim, T. I. p. 969. See also Coutumes d'Auzon (Chassaing, Spicilegium Brivatense, p. 95).

[2] See Coutume de Saint-Bonnet, cap. 13 (Meyer, Recueil d'Anciens Textes, Paris, 1874, I. 175).

[3] Les Olim, I. 491. It is perhaps needless to add that Mathieu's suit was fruitless. There are many cases recorded in the Olim showing the questions which arose and perplexed the lawyers, and the strenuous efforts made by the petty seigneurs to preserve their privileges.

the royal court of Tours. The seneschal of Anjou and Touraine brought suit before the Parlement of Paris to recover one-third of the amount, as he was entitled to that proportion of all dues arising from combats held within his jurisdiction, and he argued that the liberality of the king was not to be exercised to his disadvantage. His claim was pronounced just, and a verdict was rendered in his favor.[1]

But the loss of money was less important than the curtailment of privilege and the threatened absorption of power of which this reform was the precursor. Every step in advancing the influence of peaceful justice, as expounded by the jurists of the royal courts, was a heavy blow to the independence of the feudatories. They felt their ancestral rights assailed at the weakest point, and they instinctively recognized that, as the jurisdiction of the royal bailiffs became extended, and as appeals to the court of the Parlement of Paris became more frequent, their importance was diminished, and their means of exercising a petty tyranny over those around them were abridged. Entangled in the mazes of a code in which the unwonted maxims of Roman law were daily quoted with increasing veneration, the impetuous seigneur found himself the prey of those whom he despised, and he saw that subtle lawyers were busily undoing the work at which his ancestors had labored for centuries. These feelings are well portrayed in a song of the period, exhumed not long since by Le Roux de Lincy. Written apparently by one of the sufferers, it gives so truthful a view of the conservative ideas of the thirteenth century that a translation of the first stanza may not be amiss:—

Gent de France, mult estes esbahis!
Je di à touz ceus qui sont nez des fiez, etc.[2]

Ye men of France, dismayed and sore
Ye well may be. In sooth, I swear,

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[1] Actes du Parlement de Paris, I. 407.

[2] Recueil de Chants Historiques Français, I. 218. It is not unreasonable to conjecture that these lines may have been occasioned by the cele-

Gentles, so help me God, no more
Are ye the freemen that ye were!
Where is your freedom? Ye are brought
To trust your rights to inquest law,
Where tricks and quibbles set at naught
The sword your fathers wont to draw.
Land of the Franks!—no more that name
Is thine—a land of slaves art thou,
Of bondsmen, wittols, who to shame
And wrong must bend submissive now!

Even legists—de Fontaines, whose admiration of the Digest led him on all occasions to seek an incongruous alliance between the customary and imperial law, and Beaumanoir, who in most things was far in advance of his age, and who assisted so energetically in the work of centralization—even these enlightened lawyers hesitate to object to the principles involved in the battle trial, and while disapproving of the custom, express their views in language which contrasts strongly with the vigorous denunciations of Frederic II. half a century earlier.[1]

How powerful were the influences thus brought to bear against the innovation is shown by the fact that when the

brated trial of Enguerrand de Coucy in 1256. On the plea of baronage, he demanded trial by the Court of Peers, and claimed to defend himself by the wager of battle. St. Louis proved that the lands held by Enguerrand were not baronial, and resisted with the utmost firmness the pressure of the nobles who made common cause with the culprit. On the condemnation of de Coucy, the Count of Britanny bitterly reproached the king with the degradation inflicted on his order by subjecting its members to inquest.—Beugnot, Olim I. 954.—Grandes Chroniques ann. 1256.

[1] Et se li uns et li autres est si enreués, qu'il n'en demandent nul amesurement entrer pueent par folie en périll de gages (Conseil, chap. xv. Tit. xxvii.). Car bataille n'a mie leu ou justise a mesure (Ibid. Tit. xxviii.). Mult a de perix en plet qui est de gages de bataille, et mult es grans mestiers c'on voist sagement avant en tel cas (Cout. du Beauv. chap. lxiv. § 1). Car ce n'est pas coze selonc Diu de soufrir gages en petite querele de meubles ou d'eritages; mais coustume les suefre ès vilains cas de crieme (Ibid. chap. vi. § 31).

mild but firm hand of St. Louis no longer grasped the sceptre, his son and successor could not maintain his father's laws. In 1280 there is a record of a duel adjudged in the king's court between Jeanne de la Valete and the Sire of Montricher on an accusation of arson;[1] and about 1283 Philippe even allowed himself to preside at a judicial duel, scarcely more than twenty years after the promulgation of the ordonnance of prohibition.[2] The next monarch, Philippe le Bel, was at first guilty of the same weakness, for when in 1293 the Count of Armagnac accused Raymond Bernard of Foix of treason, a duel between them was decreed, and they were compelled to fight before the king at Gisors; though Robert d'Artois interfered after the combat had commenced, and induced Philippe to separate the antagonists.[3] Philippe, however, was too astute not to see that his interests lay in humbling feudalism in all its forms; while the rapid extension of the jurisdiction of the crown, and the limitations on the seignorial courts, so successfully invented and asserted by the lawyers, acting by means of the Parlement through the royal bailiffs, gave him power to carry his views into effect such as had been enjoyed by none of his predecessors. Able and unscrupulous, he took full advantage of his opportunities in every way, and the wager of battle was not long in experiencing the effect of his encroachments. Still, he proceeded step by step, and the vacillation of his legislation shows how obstinate was the spirit with which he had to deal. In 1296 he prohibited the judicial duel in time of war, and in 1303 he was obliged to repeat the prohibition.[4] It was probably not long after this that he interdicted the duel wholly[5]—possibly impelled thereto by a case occurring in 1303,

[1] Actes du Parlement de Paris, T. I. No. 2269 A. p. 217.

[2] Beaumanoir, op. cit. chap. lxi. § 63.

[3] Grandes Chroniques, T. IV. p. 104.

[4] Isambert, II. 702, 806.

[5] I have not been able to find this Ordonnance. Laurière alludes to it (Tabl. dés Ordonn. p. 59), but the passage of Du Cange which he cites refers only to prohibition of tournaments. The catalogue of Pardessus and

in which he is described as forced to grant the combat between two nobles, on an accusation of murder, very greatly against his wishes, and in spite of all his efforts to dissuade the appellant.[1]

In thus abrogating the wager of battle, Philippe le Bel was in advance of his age. Before three years were over he was forced to abandon the position he had assumed; and though he gave as a reason for the restoration of the duel that its absence had proved a fruitful source of encouragement for crime and villany,[2] yet at the same time he took care to place on record the assertion of his own conviction that it was worthless as a means of seeking justice.[3] In thus legalizing it by the Ordonnance of 1306, however, he by no means replaced it on its former footing. It was restricted to criminal cases involving the death penalty, excepting theft, and it was

the collection of Isambert contain nothing of the kind, but that some legislation of this nature actually occurred is evident from the preamble to the Ordonnance of 1306—"Savoir faisons que comme ça en arrière, pour le commun prouffit de nostre royaume, nous eussions defendu généraument à tous noz subgez toutes manieres de guerres et tous gaiges de batailles, etc." It is worthy of note that these ordonnances of Philippe were no longer confined to the domain of the crown, but purported to regulate the customs of the whole kingdom.

[1] Willelmi Egmond. Chron. (Matthæi Analect. IV. 135–7).

[2] Dont pluseurs malfaicteurs se sont avancez par la force de leurs corps et faulx engins à faire homicides, traysons et tous autres maléfices, griefz et excez, pource que quant ilz les avoient fais couvertement et en repost, ilz ne povoient estre convaincuz par aucuns tesmoings dont par ainsi le maléfice se tenoit.—Ordonnance de 1306 (Éd. Crapelet, p. 2).

[3] Car entre tous les périlz qui sont, est celui que on doit plus craindre et doubter, dont maint noble s'est trouvé déceu ayant bon droit ou non, par trop confier en leurs engins et en leurs forces ou par leurs ires oultrecuidées (Ibid. p. 34). A few lines further on, however, the Ordonnance makes a concession to the popular superstition of the time in expressing a conviction that those who address themselves to the combat simply to obtain justice may expect a special interposition of Providence in their favor—"Et se l'intéressé, sans orgueil ne maltalent, pour son bon droit seulement, requiert bataille, ne doit doubter engin ne force, car le vray juge sera pour lui."

only permitted when the crime was notorious, the guilt of the accused probable, and no other evidence attainable.[1] The ceremonies prescribed, moreover, were fearfully expensive, and put it out of the reach of all except the wealthiest pleaders. As the ordonnance, which is very carefully drawn, only refers to appeals made by the prosecutor, it may fairly be assumed that the defendant could merely accept the challenge and had no right to offer it.

Even with these limitations, Philippe was not disposed to sanction the practice within the domains of the crown, for, the next year (1307), we find him commanding the seneschal of Toulouse to allow no duel to be adjudged in his court, but to send all cases in which the combat might arise to the Parlement of Paris for decision.[2] This was equivalent to a formal prohibition. During the whole of the period under consideration, numerous causes came before the Parlement concerning challenges to battle, on appeals from various jurisdictions throughout the country, and it is interesting to observe how uniformly some valid reason was found for its refusal. In the public register of decisions, extending from 1254 to 1318, scarcely a single example of its permission is to be found.[3] One doubtful instance which I have observed is a curious case occurring in 1292, wherein a man accused a woman of homicide in the court of the Chapter of Soissons, and the royal officers interfered on the ground that the plaintiff was a bastard. As by the local custom he thus was in some sort a serf of the crown, they assumed that he could not risk his body without the express permission of the king. The Chapter contended for the appellant's legitimacy, and the case became so much obscured by the loss of the record of examination made, that the Parlement finally shuffled it out of court without any definite decision.[4]

[1] Ordonnance de 1306, cap. i.

[2] Isambert, II. 850.

[3] See Les Olim, *passim*.

[4] Actes du Parlement de Paris, I. 446.

Two decisions, in 1309, show that the Ordonnance of 1306 was in force, for while they admit that the duel was legally possible, the cases are settled by inquest as capable of proof by investigation. One of these was an incident in the old quarrel between the Counts of Foix and Armagnac, and its decision shows how great a stride had been made since their duel of 1293. Raymond de Cardone, a kinsman of Foix, gaged his battle in the king's court against Armagnac; Armagnac did the same against Foix and claimed that his challenge had priority over that of Raymond, while Bernard de Comminges also demanded battle of Foix. All these challenges arose out of predatory border incursions between these nobles, and in its verdict the Parlement refuses to grant the combat in any of them, orders all the parties to swear peace and give bail to keep it, and moreover condemns Foix in heavy damages to his adversaries and to the king, whose territories he had invaded in one of his forays. The Count of Foix made some objection to submitting to the sentence, but a short imprisonment brought him to his senses.[1] A more thorough vindication of the royal jurisdiction over powerful feudatories could scarcely be imagined, and the work of the civil lawyers seemed to be perfectly accomplished. It was the same with all the variety of cases involving the duel which were brought to the cognizance of the Parlement. Some ingenious excuse was always found for refusing it, whether by denying the jurisdiction of the court which had granted it, or by alleging other reasons more or less frivolous, the evident intention of all the *arrêts* being to restrict the custom, as allowed under the ordonnance, within limits so narrow as to render it practically a nullity. The astute lawyers who composed the royal court knew too well the work committed to them to hesitate as to their conclusions, while Philippe's distaste for the duel probably received a stimulus when, at the Council of

[1] Les Olim, III. 381–7.—Vaissette, Hist. Gén. de Languedoc, T. IV., Preuves, 140–44.

Vienne in 1312 he endeavored to obtain the condemnation of the memory of Boniface VIII., and two Catalan knights offered to prove by the single combat that the late pope had been legitimately elected and had not been a heretic.[1]

In spite of these efforts, the progress of reform was slow. On the breaking out afresh of the perennial contest with Flanders, Philippe found himself, in 1314, obliged to repeat his order of 1296, forbidding all judicial combats during the war, and holding suspended such as were in progress.[2] As these duels could have little real importance in crippling his military resources, it is evident that he seized such occasions to accomplish under the war power what his peaceful prerogative was unable to effect, and it is a striking manifestation of his zeal in the cause, that he could turn aside to give attention to it amid the preoccupations of the exhausting struggle with the Flemings. Yet how little impression he made, and how instinctively the popular mind still turned to the battle ordeal, as the surest resource in all cases of doubt, is well illustrated by a passage in a rhyming chronicle of the day. When the close of Philippe's long and prosperous reign was darkened by the terrible scandal of his three daughters-in-law, and two of them were convicted of adultery, Godefroy de Paris makes the third, Jeanne, wife of Philippe le Long, offer at once to prove her innocence by the combat:—

> Gentil roy, je vous requier, sire,
> Que vous m'oiez en deffendant.
> Se nul ou nule demandant
> Me vait chose de mauvestie,
> Mon cuer sens si pur, si haitie,
> Que bonement me deffendrai,
> Ou tel champion baillerai,
> Qui bien saura mon droit deffendre,
> S'il vous plest à mon gage prendre.[3]

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[1] Wadding. Annal. Minor. ann. 1312 No. 2.

[2] Isambert, III. 40.

[3] Chronique Métrique, I. 6375.

The iron hand of Philippe was no sooner withdrawn than the nobles made desperate efforts to throw off the yoke which he had so skilfully and relentlessly imposed on them. His son, Louis Hutin, not yet firmly seated on the throne, was constrained to yield a portion of the newly-acquired prerogative. The nobles of Burgundy, for instance, in their formal list of grievances, demanded the restoration of the wager of battle as a right of the accused in criminal cases, and Louis was obliged to promise that they should enjoy it according to ancient custom.[1] Those of Amiens and Vermandois were equally clamorous, and for their benefit he re-enacted the Ordonnance of 1306, permitting the duel in criminal prosecutions where other evidence was deficient, with an important extension authorizing its application to cases of theft, in opposition to previous usage.[2] A legal record, compiled about 1325 to illustrate the customs of Picardy, shows by a group of cases that it was still quite common, and that indeed it was the ordinary defence in accusations of homicide.[3] The nobles of Champagne demanded similar privileges, but Louis, by the right of his mother, Jeanne de Champagne, was Count of Champagne, and his authority was less open to dispute. He did not venture on a decided refusal, but an evasive answer, which was tantamount to a denial of the request,[4] showed that his previous concessions were extorted, and not willingly granted. Not content with this, the Champenois repeated their demand, and received the dry response, that the existing edicts on the subject must be observed.[5]

[1] Et quant au gage de bataille, nous voullons que il en usent, si comme l'en fesoit anciennement.—Ordonn. Avril 1315, cap. 1 (Isambert, III. 62).

[2] Nous voullons et octroions que en cas de murtre, de larrecin, de rapte, de trahison et de roberie, gage de bataille soit ouvert, se les cas ne pouvoient estre prouvez par tesmoings—Ordonn. 15 Mai 1315 (Isambert, III. 74).

[3] Ancien Coutumier inédit de Picardie, p. 48 (Marnier, Paris, 1840).

[4] Ordonn. Mai 1315, P. I. chap. 13 (Isambert, III. 90).

[5] Ibid. P. II. chap. 8 (Isambert, III. 95).

The threatened disturbances were avoided, and during the succeeding years the centralization of jurisdiction in the royal courts made rapid progress. It is a striking evidence of the successful working of the plans of St. Louis and Philippe le Bel that several ordonnances and charters granted by Philippe le Long in 1318 and 1319, while promising reforms in the procedures of the bailiffs and seneschals, and in the manner of holding inquests, are wholly silent on the subject of the duel, affording a fair inference that complaints on that score were no longer made.[1] Philip of Valois was especially energetic in maintaining the royal jurisdiction, and when in 1330 he was obliged to restrict the abusive use of appeals from the local courts to the Parlement,[2] it is evident that the question of granting or withholding the wager of battle had become practically a prerogative of the crown. That the challenging of witnesses must ere long have fallen into desuetude is shown by an edict of Charles VI., issued in 1396, by which he ordered that the testimony of women should be received in evidence in all the courts throughout his kingdom.[3]

Though the duel was thus deprived, in France, of its importance as an ordinary legal procedure, yet it was by no means extinguished, nor had it lost its hold upon the confidence of the people. An instructive illustration of this is afforded by the well-known story of the Dog of Montargis. Though the learned Bullet[4] has demonstrated the fabulous nature of this legend, and has traced its paternity up to the Carlovingian romances, still, the fact is indubitable that it was long believed to have occurred in 1371, under the reign of Charles le Sage, and that authors nearly contemporary with that period recount the combat of the dog and the knight as an unquestionable fact, admiring greatly the sagacity of the animal, and regarding as a matter of course both the extra-

[1] Isambert, III. 196–221.

[2] Ordonn. 9 Mai 1330 (Isambert, IV. 369).

[3] Neron, Récueil d'Édits, I. 16.

[4] Dissertations sur la Mythologie Française.

ordinary judicial proceedings and the righteous judgment of God which gave the victory to the greyhound.

In 1371 there was battle gaged between Sir Thomas Felton, Seneschal of Aquitaine, and Raymond de Caussade, Seigneur de Puycornet. Apparently they felt that a fair field could not be had in either French or English territory, and they applied to Pedro el Ceremonioso of Aragon to provide the lists for them. Pedro acceded to the request and promised to preside, provided there was due cause for a judicial duel and that the arms were agreed upon in advance, and he sent the combatants safe-conducts to come to Aragon. He assigned the city of Valencia as the place of combat, and when there was an endeavor to break off the affair on the ground that it concerned the kings of France and England, he replied that it was now too late and that the battle must take place.[1]

In 1386, the Parlement of Paris was occupied with a subtle discussion as to whether the accused was obliged, in cases where battle was gaged, to give the lie to the appellant, under pain of being considered to confess the crime charged, and it was decided that the lie was not essential.[2] The same year occurred the celebrated duel between the Chevalier de Carrouges and Jacques le Gris, to witness which the king shortened a campaign, and in which the appellant was seconded by Waleran, Count of St. Pol, son-in-law of the Black Prince. Nothing can well be more impressive than the scene so picturesquely described by Froissart. The cruelly wronged Dame de Carrouges, clothed in black, is mounted on a sable scaffold, watching the varying chances of the unequal combat between her husband, weakened by disease, and his vigorous antagonist, with the fearful certainty that, if strength alone prevail, he must die a shameful death and she be consigned to the stake. Hope grows faint and fainter; a grievous wound seems to place Carrouges at the mercy of his adversary,

[1] Bofarull y Mascaró, Coleccion de Documentos ineditos, VI. 355–59.

[2] De Laurière, note on Loysel, Instit. Coutum. Lib. VI. Tit. i. Règle 22.

until at the last moment, when all appeared lost, she sees the avenger drive his sword through the body of his prostrate enemy, vindicating at once his wife's honor and his own good cause.[1] Froissart, however, was rather an artist than an historian; he would not risk the effect of his picture by too rigid an adherence to facts, and he omits to mention, what is told by the cooler Juvenal des Ursins, that Le Gris was subsequently proved innocent by the death-bed confession of the real offender.[2] To make the tragedy complete, the Anonyme de S. Denis adds that the miserable Dame de Carrouges, overwhelmed with remorse at having unwittingly caused the disgrace and death of an innocent man, ended her days in a convent.[3] So striking a proof of the injustice of the battle ordeal is said by some writers to have caused the abandonment of the practice; but this, as will be seen, is an error, though no further trace of the combat as a judicial procedure is to be found on the registers of the Parlement of Paris.[4]

Still, it was popularly regarded as an unfailing resource. Thus, in 1390, two women were accused at the Châtelet of Paris of sorcery. After repeated torture, a confession implicating both was extracted from one of them, but the other persisted in her denial, and challenged her companion to the duel by way of disproving her evidence. In the record of the proceedings the challenge is duly entered, but no notice whatever seems to have been taken of it by the court, showing that it was no longer a legal mode of trial in such cases.[5]

In 1409, the battle trial was materially limited by an ordonnance of Charles VI. prohibiting its employment except when specially granted by the king or the Parlement;[6] and

[1] Froissart, Liv. III. chap. xlix. (Éd. Buchon, 1846).

[2] Hist. de Charles VI. ann. 1386.

[3] Hist. de Charles VI. Liv. VI. chap. ix.

[4] Buchon, notes to Froissart, II. 537.

[5] Registre du Châtelet de Paris, I. 350 (Paris, 1861).

[6] Que jamais nuls ne fussent receus au royaume de France à faire gages de bataille ou faict d'armes, sinon qu'il y eust gage jugé par le roy, ou la cour de parlement.—Juvenal des Ursins, ann. 1409.

though the latter body may never have exercised the privilege thus conferred upon it, the king occasionally did, as we find him during the same year presiding at a judicial duel between Guillaume Bariller, a Breton knight, and John Carrington, an Englishman.[1] The English occupation of France, under Henry V. and the Regent Bedford, revived the practice, and removed for a time the obstacles to its employment. Nicholas Upton, writing in the middle of the fifteenth century, repeatedly alludes to the numerous cases in which he assisted as officer of the Earl of Salisbury, Lieutenant of the King of England; and in his chapters devoted to defining the different species of duel he betrays a singular confusion between the modern ideas of reparation of honor and the original object of judicial investigation, thus fairly illustrating the transitional character of the period.[2]

It was about this time that Philippe le Bon, Duke of Burgundy, formally abolished the wager of battle, as far as lay in his power, throughout the extensive dominions of which he was sovereign, and in the Coutumier of Burgundy, as revised by him in 1459, there is no trace of it to be found. The code in force in Britanny until 1539 permitted it in cases of contested estates, and of treason, theft, and perjury—the latter, as usual, extending it over a considerable range of civil actions, while the careful particularization of details by the code shows that it was not merely a judicial antiquity.[3] In Normandy, the legal existence of the judicial duel was even more prolonged, for it was not until the revision of the coutumier in 1583, under Henry III., that the privilege of deciding in this way numerous cases, both civil and criminal, was formally abolished.[4] Still, it may be assumed that, practically, the

[1] Monstrelet, Liv. I. chap. lv.

[2] Nic. Uptoni de Militari Officio Lib. II. cap. iii. iv. (pp. 72-73).

[3] Très Ancienne Cout. de Bretagne, chap. 99, 129–135 (Bourdot de Richebourg).

[4] Ancienne Cout. de Normandie, chap. 53, 68, 70, 71, 73, etc. (Bourdot de Richebourg).

custom had long been obsolete, though the tardy process of revising the local customs allowed it to remain upon the statute book to so late a date. The fierce mountaineers of remote Béarn clung to it more obstinately, and in the last revision of their code, in 1552, which remained unaltered until 1789, it retains its place as a legitimate means of proof, in default of other testimony, with a heavy penalty on the party who did not appear upon the field at the appointed time.[1]

During this long period, examples are to be found which show that although the combat was falling into disuse, it was still a legal procedure, which in certain cases could be claimed as a right, or which could be decreed and enforced by competent judicial authority. Among the privileges of the town of Valenciennes was one to the effect that any homicide taking refuge there could swear that the act had been committed in self-defence, when he could be appealed only in battle. This gave occasion to a combat in 1455 between a certain Mahuot and Jacotin Plouvier, the former of whom had killed a kinsman of the latter. Neither party desired the battle, but the municipal government insisted upon it, and furnished them with instructors to teach the use of the club and buckler allowed as arms. The Comte de Charolois, Charles le Téméraire, endeavored to prevent the useless cruelty, but the city held any interference as an infringement of its chartered rights; and, after long negotiations, Philippe le Bon, the suzerain, authorized the combat and was present at it. The combatants, according to custom, had the head shaved and the nails pared on both hands and feet; they were dressed from head to foot in a tight-fitting suit of hardened leather, and each was anointed with grease to prevent his antagonist from clutching him. The combat was long and desperate, but at length the appellant literally tore out the heart of his antagonist.[2] Such

[1] Fors et Cost. de Béarn, Rubr. de Batalha (Bourdot de Richebourg, IV. 1093).

[2] Mathieu de Coussy, chap. cxii.—Ol. de la Marche, ch. xxii. Such a case as this justifies the opinion quoted by Olivier de la Marche, "que le

incidents among roturiers, however, were rare. More frequently some fiery gentleman claimed the right of vindicating his quarrel at the risk of his life. Thus, in 1482, shortly after the battle of Nancy had reinstated René, Duke of Lorraine, on the ruins of the second house of Burgundy, two gentlemen of the victor's court, quarrelling over the spoils of the battle-field, demanded the *champ-clos;* it was duly granted, and on the appointed day the appellant was missing, to the great discomfiture and no little loss of his bail.[1] When Charles d'Armagnac, in 1484, complained to the States General of the inhuman destruction of his family, committed by order of Louis XI., the Sieur de Castlenau, whom he accused of having poisoned his mother, the Comtesse d'Armagnac, appeared before the assembly, and, his advocate denying the charge, presented his offer to prove his innocence by single combat.[2] In 1518, Henry II. of Navarre ordered a judicial duel at Pau between two contestants, of whom the appellant made default; the defendant was accordingly pronounced innocent, and was empowered to drag through all cities, villages, and other places through which he might pass, the escutcheon and effigy of his adversary, who was further punished by the prohibition thenceforth to wear arms or knightly bearings.[3] In 1538, Francis I. granted the combat between Jean du Plessis and Gautier de Dinteville, which would appear to have been essentially a judicial proceeding, since the defendant, not appearing at the appointed time, was condemned to death by sentence

gaige de bataille fut trouvé par le diable pour gagner et avoir les âmes de tous les deux, tant du demandeur que du deffendeur" (Traité du Duel Judiciaire, p. 4, communicated to me by George Neilson, Esq.).

[1] D. Calmet, Hist. de Lorraine.

[2] Jehan Masselin, Journal des États de Tours, p. 320.

[3] Archives de Pau, *apud* Mazure et Hatoulet, Fors de Béarn, p. 130. There may have been something exceptional in this case, since the punishment was so much more severe than the legal fine of 16 sous quoted above (Fors de Morlaas, Rubr. IV.).

of the high council, Feb. 20, 1538.[1] The duel thus was evidently still a matter of law, which vindicated its majesty by punishing the unlucky contestant who shrank from the arbitrament of the sword.

Allusion has already been made to the celebrated combat between Chastaigneraye and Jarnac, in 1547, wherein the death of the former, a favorite of Henry II., led the monarch to take a solemn oath never to authorize another judicial duel. Two years later, two young nobles of his court, Jacques de Fontaine, Sieur de Fendilles, and Claude des Guerres, Baron de Vienne-le-Chatel, desired to settle in this manner a disgusting accusation brought against the latter by the former. The king, having debarred himself from granting the appeal, arranged the matter by allowing Robert de la Marck, Marshal of France, and sovereign Prince of Sedan, to permit it in the territory of which he was suzerain. Fendilles was so sure of success that he refused to enter the lists until a gallows was erected and a stake lighted, where his adversary after defeat was to be gibbeted and burned. Their only weapons were broad-swords, and at the first pass Fendilles inflicted on his opponent a fearful gash in the thigh. Des Guerres, seeing that loss of blood would soon reduce him to extremity, closed with his antagonist, and being a skilful wrestler speedily threw him. Reduced to his natural weapons, he could only inflict blows with the fist, which failing strength rendered less and less effective, when a scaffold crowded with ladies and gentlemen gave way, throwing down the spectators in a shrieking mass. Taking advantage of the confusion, the friends of Des Guerres violated the law which imposed absolute silence and neutrality on all, and called to him to blind and suffocate his adversary with sand. Des Guerres promptly took the hint, and Fendilles succumbed to this unknightly weapon. Whether he formally yielded or not was disputed. Des Guerres claimed that he should undergo the punishment of the gallows and

[1] D. Calmet, Hist. de Lorraine.

stake prepared for himself, but de la Marck interfered, and the combatants were both suffered to retire in peace.[1] This is the last recorded instance of the wager of battle in France. The custom appears never to have been formally abolished, and so little did it represent the thoughts and feelings of the age which witnessed the Reformation, that when, in 1566, Charles IX. issued an edict prohibiting duels, no allusion was made to the judicial combat. The encounters which he sought to prevent were solely those which arose from points of honor between gentlemen, and the offended party was ordered not to appeal to the courts, but to lay his case before the Marshals of France, or the governor of his province.[2] The custom had died a natural death. No ordonnance was necessary to abrogate it; and, seemingly, from forgetfulness, the crown and the Parlement appear never to have been divested of the right to adjudge the wager of battle.

In Italy many causes conspired to lead to the abrogation of the judicial duel. On the one hand there were the prescriptions of the popes, and on the other the spirit of scepticism fostered by the example of Frederic II. The influence of the resuscitated Roman law was early felt and its principles were diffused by the illustrious jurists who rendered the Italian schools famous. Burgher life, moreover, was precociously developed in the social and political organization, and as the imperial influence diminished with the fall of the House of Hohenstaufen, the cities assumed self-government and fashioned their local legislation after their own ideals. The judgments of God were not indigenous in Italy; they were not ancestral customs rooted in the prehistoric past, but were

[1] Brantôme, Discours sur les Duels. An account of this duel, published at Sedan, in 1620, represents it as resulting even less honorably to Fendilles. He is there asserted to have formally submitted, and to have been contemptuously tossed out of the lists like a sack of corn, Des Guerres marching off triumphantly, escorted with trumpets.

[2] Fontanon, I. 665.

foreign devices introduced by conquerors—first by the Lombards and then by the Othos. There were thus many reasons why the trial by combat should disappear early from the Italian statute books. There is no trace of it in the elaborate criminal code of Milan compiled in 1338, nor in that of Piacenza somewhat later; in fact, it was no longer needed, for the inquisitional process was in full operation and in doubtful cases the judge had all the resources of torture at his disposal.[1]

Although by the middle of the fourteenth century it had thus disappeared from the written law, the rulers retained the right to grant it in special cases, and it thus continued in existence as a lawful though extra-legal mode of settling disputed cases. Where suzerains were so numerous there was thus ample opportunity for belligerent pleaders to gratify their desires. Even as late as 1507 Giovanni Paolo Baglioni, lord of Spello (a village in the Duchy of Spoleto, near Foligno), granted a licence for a month to Giovanni Batta Gaddi and Raffaello Altoviti to settle their suits by fighting within his domain with three comrades.[2] Two years after this, Julius II., in issuing a constitution directed against duels of honor, took occasion also to include in his prohibition all such *purgationes vulgares*, even though permitted by the laws; the combatants were ordered, in all the States of the Church, to be arrested and punished for homicide or maiming according to the common law.[3] In 1519 Leo X. reissued this bull with vastly sharper penalties on all concerned, but in his additions to it he seems merely to have in mind the duel of honor, which was habitually conducted in public, in lists prepared for the purpose, and in presence of the prince or noble who had granted licence for it.[4] The legal combat may be considered to have virtually disappeared, but the duel of honor which

[1] Statuta Criminalia Mediolani e tenebris in lucem edita, Bergomi, 1594. —Statuta et Decreta antiqua Civitatis Placentiæ, Placentiæ, 1560.

[2] Patetta, Le Ordalie, p. 449.

[3] Julii PP. II. Bull. *Regis pacifici* § 2, 1509 (Mag. Bull. Rom. I. 499).

[4] Leon. PP. X. Bull. *Quam Deo*, 23 Julii, 1519 (Ib. p. 596).

succeeded it inherited some of its sanctions, and in the learned treatises on the subject which appeared during the first half of the sixteenth century there are still faint traces to be found of the survival of the idea of the judgment of God.[1]

In Hungary, it was not until 1486 that any attempt was made to restrict the judicial duel. In that year Matthias Corvinus prohibited it in cases where direct testimony was procurable: where such evidence was unattainable, he still permitted it, both in civil and criminal matters.[2] In 1492 Vladislas II. repeated this prohibition, alleging as his reason for the restriction the almost universal employment of champions who sometimes sold out their principals. The terms of the decree show that previously its use was general, though it is declared to be a custom unknown elsewhere.[3]

In Flanders, it is somewhat remarkable that the duel should have lingered until late in the sixteenth century, although, as we have seen above, the commercial spirit of that region had sought its abrogation at a very early period, and had been seconded by the efforts of Philippe le Bon in the fifteenth century. Damhouder, writing about the middle of the sixteenth century, states that it was still legal in matters of public concern, and even his severe training as a civil lawyer cannot prevent his declaring it to be laudable in such affairs.[4] Indeed, when the Council of Trent, in 1563, stigmatized the duel as the work of the devil and prohibited all potentates from granting it under pain of excommunication and forfeiture

[1] Patetta, op. cit. pp. 438–46.

[2] Eph. Gerhardi Tract. Jurid. de Judic Duellico c. ii. § 11.

[3] Quia in duellorum dimicatione plurimæ hinc inde fraudes committi possunt; raro enim illi inter quos illud fit judicium per se decertant, sed pugiles conducunt, qui nonnunquam dono, favore, et promissis corrumpuntur.—L. Uladis. II. c. ix. (Batthyani, I. 531).

[4] Reperio tamen indubie vulgarem purgationem sive duellum in casu sine scrupulo admittendum quum publicæ salutis caussa fiat: et istud est admodum laudabile.—Damhouder. Rer. Crimin. Praxis cap. xlii. No. 12 (Antverp. 1601).

of all feudal possessions,[1] the state Council of Flanders, in their report to the Duchess of Parma on the reception of the Council, took exception to this canon, and decided that the ruler ought not to be deprived of the power of ordering the combat.[2] In this view, the Council of Namur agreed.[3]

In Germany, in spite of the imperial legislation referred to above (p. 212), feudal influences were too strong to permit an early abrogation of the custom. Throughout the fifteenth century the wager of battle continued to flourish, and MSS. of the period give full directions as to the details of the various procedures for patricians and plebeians. The sixteenth century saw its wane, though it kept its place in the statute books, and *Fechtbücher* of 1543 and 1556 describe fully the use of the club and the knife. Yet when in 1535 Friedrich von Schwartzenberg demanded a judicial duel to settle a suit with Ludwig von Hutten, the latter contemptuously replied that such things might be permitted in the times of Goliath and Dietrich of Bern, but that now they were not in accordance with law, right, or custom, and von Schwartzenberg was obliged to settle the case in more peaceful fashion. Still, occasional instances of its use are said to have occurred until the close of the century,[4] and as late as 1607, Henry, Duke of Lorraine, procured from the Emperor Rodolph II. the confirmation of a privilege which he claimed as ancestral that all combats occurring between the Rhine and the Meuse should be fought out in his presence.[5]

In Russia, under the code known as the Ulogenié Zakonof, promulgated in 1498, any culprit, after his accuser's testimony

[1] Concil. Trident. Sess. xxv. De Reform. cap. xix. Detestabilis duellorum usus fabricante diabolo introductus.

[2] Anne is usus relinquendus sit arbitrio principis? Videtur quod sic, et respiciendum esse principi quid discernat.—Le Plat, Monument. Concil. Trident. VII. 19.

[3] Le Plat, VII. 75.

[4] Würdinger, Beiträge, pp. 17, 19.

[5] Belitz de Duellis German. p. 15.

was in, could claim the duel; and as both parties went to the field accompanied by all the friends they could muster, the result was not infrequently a bloody skirmish. These abuses were put an end to by the Sudebtnick, issued in 1550, and the duel was regulated after a more decent fashion, but it continued to flourish legally until it was finally abrogated in 1649 by the Czar Alexis Mikhailovich, in the code known as the Sobornoié Ulogenié. The more enlightened branch of the Slavonic race, however, the Poles, abolished it in the fourteenth century; but Macieiowski states that in Servia and Bulgaria the custom has been preserved to the present day.[1]

In other countries, the custom likewise lingered to a comparatively late period. Scotland, indeed, was somewhat more forward than her neighbors; for in the year 1400, her Parliament showed the influence of advancing civilization by limiting the practice in several important particulars, which, if strictly observed, must have rendered it almost obsolete. Four conditions were pronounced essential prerequisites: the accusation must be for a capital crime; the offence must have been committed secretly and by treachery; reasonable cause of suspicion must be shown against the accused, and direct testimony both of witnesses and documents must be wanting.[2]

Still the "perfervidum ingenium Scotorum" clung to the arbitrament of the sword with great tenacity. In 1532 Sir James Douglass accused his son-in-law Robert Charteris of treason, and the charge was settled by a judicial duel in the presence of James V., who put an end to it when Charteris's

[1] For these details I am indebted to Du Boys, Droit Criminel des Peuples Modernes, I. 611–17, 650. See also Patetta, Le Ordalie, p. 161. The Sachsenspiegel was extensively in use in Poland, and under it duels continued to be lawful until its abrogation early in the sixteenth century by Alexander I. (Ib. p. 162).

[2] Statut. Roberti III. cap. iii. The genuineness of this statute has been questioned, but it undoubtedly reflects the practice of the period. For the evidence, see Neilson (Trial by Combat, p. 256), who further notes the identity of these provisions with those of Philippe le Bel's ordonnance of 1306.

sword broke.[1] Knox relates that in 1562, when the Earl of Arran was consulting with him and others respecting a proposed accusation against Bothwell for high treason, arising out of a plan for seizing Queen Mary which Bothwell had suggested, the earl remarked, "I know that he will offer the combate unto me, but that would not be suffered in France, but I will do that which I have proposed." In 1567, also, when Bothwell underwent a mock trial for the murder of Darnley, he offered to justify himself by the duel; and when the Lords of the Congregation took up arms against him, alleging as a reason the murder and his presumed designs against the infant James VI., Queen Mary's proclamation against the rebels recites his challenge as a full disproval of the charges. When the armies were drawn up at Carberry Hill, Bothwell again came forward and renewed his challenge. James Murray, who had already offered to accept it, took it up at once, but Bothwell refused to meet him on account of the inequality in their rank. Murray's brother, William of Tullibardin, then offered himself, and Bothwell again declined, as the Laird of Tullibardin was not a peer of the realm. Many nobles then eagerly proposed to take his place, and Lord Lindsay especially insisted on being allowed the privilege of proving the charge on Bothwell's body, but the latter delayed on various pretexts, until Queen Mary was able to prohibit the combat.[2] The last judicial duels fought in Scotland were two which occurred as the sixteenth century was closing. In 1595, under a warrant from James VI. John Brown met George Hepburn and was vanquished, though his life was spared at the request of the judges. In 1597 Adam Bruntfield charged James Carmichael with causing the death of his brother, and under royal licence fought and slew him before a crowd of five thousand spectators. Yet even this was not the end of the legal custom, for in 1603 an accusation of treason against Francis Mowbray was ad-

[1] Neilson's Trial by Combat, p. 292.

[2] Knox's Hist. of Reformation in Scotland, pp. 322, 446–7.

judged to be settled by the duel, though the combat was prevented by Mowbray meeting his death in an attempt to escape from prison, after which he was duly hanged and quartered.[1]

In England, the resolute conservatism, which resists innovation to the last, prolonged the existence of the wager of battle until a period unknown in other enlightened nations. No doubt a reason for this may be found in the rise of the jury trial towards the end of the twelfth century, which, as we have seen above (p. 144), furnished an effective substitute for the combat in doubtful cases. As the jury system developed itself in both civil and criminal matters the sphere of the duel became more limited, in practice if not in theory, and its evils being thus less felt the necessity for its formal abrogation was less pressing.[2] It was thus enabled to hold its place as a recognized form of procedure to a later period than in any other civilized land. Already in the first quarter of the thirteenth century Mr. Maitland tells us that in criminal cases it had become uncommon, but the number of examples of it which he gives shows that this can only be in comparison with its greater frequency in the preceding century and that it was still in common use notwithstanding the tendency of the judges to disallow it.[3] At the close of the fourteenth century, when France was engaged in rendering it rapidly obsolete, Thomas, Duke of Gloucester, dedicated to his nephew Richard II. a treatise detailing elaborately the practice followed in the Marshal's court with respect to judicial duels.[4] Even a century

[1] Neilson's Trial by Combat, pp. 307, 310.

[2] Neilson's Trial by Combat, p. 35. See also a very interesting essay on the origin and growth of the jury by Prof. J. B. Thayer in the Harvard Law Review, Jan.–March, 1892.

[3] Maitland's Select Pleas of the Crown, p. xxiv. Whatever may have been the desire of the royal judges, King John himself was not averse to it, for there is a record of two duels between common malefactors ordered to be fought before the king "quia ea vult videre" (Ib. p. 40).

[4] Spelman (Gloss. s. v. *Campus*) gives a Latin translation of this interesting document from a MS. of the period.

Mr. Neilson draws (pp. 167, 168) a distinction, which is evidently correct,

later, legislation was obtained to prevent its avoidance in certain cases. The "Statute of Gloucester" (6 Ed. II. cap. 9), in 1333, had given to the appellant a year and a day in which to bring his appeal of death—a privilege allowed the widow or next of kin to put the accused on a second trial after an acquittal on a public indictment—which, as a private suit, was usually determined by the combat. In practice, this privilege was generally rendered unavailing by postponing the public prosecution until the expiration of the delay, so as to prevent the appeal. In 1486, however, a law was passed to diminish the frequency of murder, which required the trial to be finished before the expiration of the year and day, and ordered the justices, in case of acquittal, to hold the defendant in prison or on bail until the time had passed, so as to insure to the widow or next of kin the opportunity of prosecuting the appeal of death.[1] Another evidence of the prevalence of the custom is to be found in the rule which, in the fifteenth century, permitted a priest to shrive a man who was about to wage his battle, without regard to the fact as to whose parishioner he might legally be—

> And of mon that schal go fyghte
> In a bateyl for hys ryghte,
> Hys schryft also thou myghte here,
> Thagh he thy pareschen neuer were.[2]

With the advance of civilization and refinement, the custom gradually declined, but it was not abolished. The last duel fought out in England is said to be one in 1492 between Sir James Parker and Hugh Vaughan, arising from a grant of

between what he calls the chivalric duel, conducted by marshals and constables, and the ordinary combat adjudged by the courts of law. The former makes it appearance in the latter half of the fourteenth century, when the common law duel was falling into desuetude. As we have seen above, a somewhat similar development, though not so formally differentiated, is traceable in France and Italy.

[1] 3 Henr. VII. cap. 1.

[2] John Myrc's Instructions for Parish Priests, p. 26 (Early English Text Society, 1868).

armorial bearings to Vaughan; it was fought on horseback with lances, and at the first course Vaughan slew his antagonist.[1] Still the old laws remained unaltered, and an occasional appeal to them, while it offended men's common sense, was insufficient to cause their repeal. In 1571 a case occurred, as Spelman says, "non sine magna jurisconsultorum perturbatione," when, to determine the title to an estate in Kent, Westminster Hall was forced to adjourn to Tothill Fields, and all the preliminary forms of a combat were literally enacted with the most punctilious exactness, though an accommodation between the parties saved the skulls of their champions.[2] In 1583, however, a judicial duel was actually fought in Ireland between two O'Connors on an accusation of treason brought by one against the other, which ended by the appellant cutting off the defendant's head and presenting it on his sword's point to the justices.[3]

A device, peculiar to the English jurisprudence, allowed a man indicted for a capital offence to turn "approver," by confessing the crime and charging or appealing any one he choose as an accomplice, and this appeal was usually settled by the single combat. Indeed, even when a criminal had confessed he was sometimes pardoned on condition of his being victorious in a specified number of duels, and thus compounding for his own life by the service rendered to society in relieving it of so many malefactors, as in a case in 1221 where a confessed thief "became approver to fight five battles."[4]

[1] Stow's Annals, ann. 1492.

[2] Spelman, Gloss. p. 103.—Stow's Annals, ann. 1571.

[3] Neilson, Trial by Combat, p. 205.

[4] Maitland's Select Pleas of the Crown, I. 92. See Neilson, p. 154, for an account of a savage combat in 1456 with an approver who had already caused the hanging of several innocent men. In this case the judge laid down the law that if the approver was vanquished the defendant must be hanged for homicide. This strange ruling is not in accordance with earlier practice. In 1220 an approver accuses seven persons, but is defeated in the first combat and hanged, whereupon the accused are discharged on bail (Maitland, Select Pleas, I. 123). See two other cases in the same year (Ibid. p. 133).

The custom continued to be a feature of criminal jurisprudence sufficiently important to require legislation as late as the year 1599, when the Act 41 Eliz. chap. 3 was passed to regulate the nice questions which attended appeals of several persons against one, or of one person against several. In the former case, the appellee, if victorious in the first duel, was acquitted; in the latter, the appellor was obliged to fight successively with all the appellees.[1] In civil suits the last case on record, I believe, is that of Claxton *v.* Lilburn, which shows curiously enough the indisposition to put an end to what was regarded by common consent as a solecism. A valuable estate in Durham, said to be worth more than £200 a year, was the subject in dispute. Claxton had been unsuccessful in a suit for its recovery, and had brought a new action, to which Lilburn responded, Aug. 6th, 1638, by producing in court his champion, George Cheney, in array, armed with a sandbag and battoon, who cast into the court his gauntlet with five small pence in it, and demanded battle. Claxton rejoined by producing a champion similarly armed, and gaged his battle. The court was nonplussed, putting off the proceedings from day to day, and seeking some excuse for refusing the combat. The champions were interrogated, and both admitted that they were hired for money. King Charles demanded the opinion of the Chief Justice and all his barons whether this was sufficient to invalidate the proceedings, but they unanimously replied that after battle was gaged and sureties given, such confession was no bar to its being carried out. The King then ordered his judges if possible to find some just way for its prevention, but they apparently could do nothing save procrastinate the matter for years, for in 1641 Lilburn petitioned the Long Parliament, setting forth that he had repeatedly

[1] Hale, Pleas of the Crown, II. chap. xxix. According to Pike (Hist. of Crime in England, I. 286 sq.), the record shows that approvers almost invariably either died in prison or were hanged in consequence of the acquittal of the party whom they accused. It was very rare that a combat ensued.

claimed his right of battle and had produced his champion, but was ever put off by the judges finding some error in the record. Parliament thereupon ordered a bill to be brought in taking away the judicial combat.[1] It was not enacted however, and Sir Matthew Hale, writing towards the close of the century, feels obliged to describe with considerable minuteness the various niceties of the law, though he is able to speak of the combat as "an unusual trial at this day."[2]

In 1774, the subject incidentally attracted attention in a manner not very creditable to the enlightenment of English legislation. When, to punish the rebellious Bostonians for destroying the obnoxious tea, a "Bill for the improved administration of justice in the province of Massachusetts Bay" was passed, it originally contained a clause depriving the New Englanders of the appeal of death, by which, it will be remembered, a man acquitted of a charge of murder could be again prosecuted by the next of kin, and the question could be determined by the wager of battle. The denial of this ancestral right aroused the indignation of the liberal party in the House of Commons, and the point was warmly contested. The learned and eloquent Dunning, afterwards Lord Ashburton, one of the leaders of opposition, defended the ancient custom in the strongest terms. "I rise," said he, "to support that great pillar of the constitution, the appeal for murder; I fear there is a wish to establish a precedent for taking it away in England as well as in the colonies. It is called a remnant of barbarism and gothicism. The whole of our constitution, for aught I know, is gothic. . . . . I wish, sir, that gentlemen would be a little more cautious, and consider that the yoke we are framing for the despised colc-

[1] Rushworth's Collections, Vol. I. P. I. pp. 788–90, P. III. p. 356. The gloves presented by the champions in such trials had a penny in each finger; the principals were directed to take their champions to two several churches and offer the pennies in honor of the five wounds of Christ that God might give the victory to the right (Neilson's Trial by Combat, p. 149).

[2] Hale, loc. cit.

nists may be tied round our own necks!" Even Burke was heard to lift a warning voice against the proposed innovation, and the obnoxious clause had to be struck out before the ministerial majority could pass the bill.[1] Something was said about reforming the law throughout the empire, but it was not done, and the beauty of the "great pillar of the constitution," the appeal of death, was shown when the nineteenth century was disgraced by the resurrection of all the barbaric elements of criminal jurisprudence. In 1818, the case of Ashford *vs.* Thornton created much excitement. Ashford was the brother of a murdered girl, whose death, under circumstances of peculiar atrocity, was charged upon Thornton, with much appearance of probability. Acquitted on a jury trial, Thornton was appealed by Ashford, when he pleaded "Not guilty, and I am ready to defend the same by my body." After elaborate argument, Lord Ellenborough, with the unanimous assent of his brother justices, sustained the appellee's right to this as "the usual and constitutional mode of trial," expounding the law in almost the same terms as those which we read in Bracton and Beaumanoir.[2] The curious crowd was sorely disappointed when the appellant withdrew, and the chief justice was relieved from the necessity of presiding over a gladiatorial exhibition. A similar case occurred almost simultaneously in Ireland, and the next year the Act 59 Geo. III. chap. 46, at length put an end to this remnant of Teutonic barbarism.[3]

America, inheriting the blessings of English law, inherited also its defects. The colonies enjoyed the privilege of the appeal of death, against the abrogation of which, in the province of Massachusetts Bay, Dunning protested so vehemently. At least one instance of its employment is to be found here,

[1] Campbell's Lives of the Chancellors of England, VI. 112.

[2] I. Barnewall & Alderson, 457.—In April, 1867, the journals record the death at Birmingham of William Ashford the appellant in this suit. Thornton emigrated to America, and disappeared from sight.

[3] Campbell, Chief Justices, III. 169.

when in 1765, in Maryland, Sarah Soaper appealed a negro slave named Tom for the murder of her husband. The negro, however, was probably not aware of his privilege to demand the wager of battle, so he submitted to be tried by a jury, and was duly condemned and executed.[1] John C. Gray, Jr., Esq., of Boston, to whom I am indebted for calling my attention to this and some other sources of information on the subject, informs me of a tradition that a disputed question of boundary between two townships in New Hampshire was once settled by combat between champions; but the most conservative State in this respect appears to be South Carolina. An act of that colony, in 1712, enumerating the English laws to be held in force, specifically includes those concerning appeal of death, and Dr. Cooper, in his "Statutes at Large of South Carolina," writing in 1837, seems to think that both the wager of battle and appeal of death were still legally in force there at that time.[2] So Chancellor Kilty, in his Report on English Statutes applicable to Maryland, made in 1811, apparently considers that the appeal of death was still legally existent, but regards it as unimportant in view of the pardoning power and other considerations.[3]

[1] I. Harris and McHenry's Md. Reps. 227.

[2] Cooper's Statutes at Large of S. C. II. 403, 715.

[3] Kilty's Report on English Statutes, Annapolis, 1811, p. 141.

III.

THE ORDEAL.

CHAPTER I.

UNIVERSAL INVOCATION OF THE JUDGMENT OF GOD.

ALTHOUGH the wager of battle and the other ordeals have much in common, there is sufficient distinction between them to render convenient their separate consideration, even at the risk of a little occasional repetition. The development and career of these forms of the judgment of God were not in all respects similar, nor was their employment in all cases the same. The mere fact that the duel was necessarily a bilateral ordeal, to which both sides had to submit, in itself establishes a limit as to the cases fitted for its employment, nor were all races of mankind adapted by character for its use. Moreover, in its origin it was simply a device for regulating under conditions of comparative fairness the primitive law of force, and the conception of the intervention of a Divine Power, whereby victory would enure to the right, probably was a belief subsequently engrafted on it. In the other ordeals this is the fundamental idea on which they were based, and we may perhaps assume that they represent a later development in human progress, in which brute strength has declined somewhat from its earliest savage supremacy, and a reliance upon the interposition of a superhuman agency, whether the spirit of a fetish or an omnipotent and just Godhead, single or multiform, has

grown sufficiently strong to be a controlling principle in the guidance of daily life.

Yet this, too, is only a step in the evolution of human thought, before it can grasp the conception of an Omnipotence that shall work out its destined ends, and yet allow its mortal creatures free scope to mould their own fragmentary portions of the great whole—a Power so infinitely great that its goodness, mercy, and justice are compatible with the existence of evil in the world which it has formed, so that man has full liberty to obey the dictates of his baser passions, without being released from responsibility, and, at the same time, without disturbing the preordained results of Divine wisdom and beneficence. Accordingly, we find in the religious history of almost all races that a belief in a Divine Being is accompanied with the expectation that special manifestations of power will be made on all occasions, and that the interposition of Providence may be had for the asking, whenever man, in the pride of his littleness, condescends to waive his own judgment, and undertakes to test the inscrutable ways of his Creator by the touchstone of his own limited reason. Thus miracles come to be expected as matters of every-day occurrence, and the laws of nature are to be suspended whenever man chooses to tempt his God with the promise of right and the threat of injustice to be committed in His name.

To this tendency of the human mind is attributable the almost universal adoption of the so-called Judgment of God, by which men, oppressed with doubt, have essayed in all ages to relieve themselves from responsibility by calling in the assistance of Heaven. Nor, in so doing, have they seemed to appreciate the self-exaltation implied in the act itself, but in all humility have cast themselves and their sorrows at the feet of the Great Judge, making a merit of abnegating the reason which, however limited, has been bestowed to be used and not rejected. In the Carlovingian Capitularies there occurs a passage, dictated doubtless by the spirit of genuine trust in God, which well expresses the pious sentiments pre-

siding over acts of the grossest practical impiety: "Let doubtful cases be determined by the judgment of God. The judges may decide that which they clearly know, but that which they cannot know shall be reserved for Divine judgment. Whom God hath kept for his own judgment may not be condemned by human means. 'Therefore judge nothing before the time, until the Lord come, who both will bring to light the hidden things of darkness, and will make manifest the counsels of the hearts'"[1] (1 *Cor.* iv. 5). That Heaven would interpose to save the guiltless was taught in too many ways to admit of doubt. An innocent man, we are told, was accused of a murder and pursued till he took refuge in the cell of St. Macarius, who at once proposed to determine the question of his guilt by an appeal to God. Adjourning to the grave of the slain the saint addressed a prayer to Christ and then called upon the dead man to declare whether the accused had killed him. A voice from the tomb responded in the negative and the fugitive was released; but when the saint was asked to pursue the investigation and ascertain the name of the murderer, he replied that this was none of his duty, for the sinner might already have repented.[2]

The superstition which we here find dignified with the forms of Christian faith manifests itself among so many races and under such diverse stages of civilization that it may be regarded as an inevitable incident in human evolution, only to be outgrown at the latest periods of development. In this, however, as in so many other particulars, China furnishes virtually an exception. Her arrested thought exhibits itself, in the King or sacred books collected by Confucius five hundred years before the Christian era, in nearly the same form as is found in the orthodox opinion of to-day. In this, religious belief is but a system of cold morality, which avoids the virtues as well as the errors of more imaginative faiths.

[1] Capit. Lib. VII. cap. 259.

[2] Vita Patrum Lib. III. c. 41 (Migne's Patrologia, T. LXXIII. p. 764).

In the most revered and authoritative of the Chinese Scriptures, the Shu-King, or Holy Book, we find a theo-philosophy based on a Supreme Power, *Tai-Ki*, or Heaven, which is pure reason, or the embodiment of the laws and forces of nature acting under the pressure of blind destiny. It is true that some forms of divination were practised, and even enjoined, but no fuller expression of belief in direct interposition from above is to be found than that contained in the saying attributed to Muh-Wang (about 1000 B. C.) in his instructions to his judges in criminal cases: "Say not that Heaven is unjust; it is man who brings these evils on himself. If it were not that Heaven inflicts these severe punishments the world would be ungoverned."[1] It is, therefore, in strict compliance with this philosophy that in the modern jurisprudence of China there is no allusion to any evidence save that of facts duly substantiated by witnesses, and even oaths are neither required nor admitted in judicial proceedings.[2]

These teachings, however, are too refined and sublimated for ordinary human nature, and along-side of official Confucianism, Taoism and Buddhism flourish with a wealth of legends and marvels that may fairly rival the most exuberant fancies of Teutonic or Latin mediævalism. In the popular mind, therefore, the divine interposition may perpetually be expected to vindicate innocence and to punish crime, and moral teaching to a great extent consists of histories illustrating this belief in all its phases and in every possible contingency of common-place life. Thus it is related that in A. D. 1626 the learned Doctor Wang-i had two servants, one stupid and the other cunning. The latter stole from his master a sum of money, and caused the blame to fall upon his comrade, who was unable to justify himself. By way of securing him, he was tied to a flagstaff, and his accuser was set to watch him through the night. At midnight the flagstaff

[1] Shu-King, Pt. IV. ch. 4, 27 § 21 (after Goubil's translation).

[2] Staunton, Penal Code of China, p. 364.

broke in twain with a loud noise, the upper portion falling upon the guilty man and killing him, while the innocent was left unhurt; and next morning, when the effects of the dead man were examined, the stolen money was found among them, thus completely establishing the innocence of his intended victim.[1] Popular beliefs such as these naturally find their expression in irregular judicial proceedings, in spite of the strict materialism of the written law, and, at least in some parts of China, a curious form of the ordeal of chance is employed in default of testimony. If an injured husband surprises his wife *flagrante delicto* he is at liberty to slay the adulterous pair on the spot; but he must then cut off their heads and carry them to the nearest magistrate, before whom it is incumbent on him to prove his innocence and demonstrate the truth of his story. As external evidence is not often to be had in such cases, the usual mode of trial is to place the heads in a large tub of water, which is violently stirred. The heads, in revolving, naturally come together in the centre, when, if they meet back to back, the victims are pronounced guiltless, and the husband is punished as a murderer; but if they meet face to face, the truth of his statement is accepted as demonstrated, he is gently bastinadoed to teach him that wives should be more closely watched, and is presented with a small sum of money wherewith to purchase another spouse.[2]

The cognate civilization of Japan yields even more readily to the temptation of seeking from the Deity a solution of doubt. Anciently there were in general use the judgments of God, so well known in mediæval Europe, of the wager of battle and the ordeal of boiling water, and the latter is still customarily employed among the Ainos, or aborigines. Even yet two antagonists may be seen to plunge their hands in

[1] Livre des Récompenses et des Peines, trad. par Stan. Julien, Paris, 1835, p. 220.

[2] W. T. Stronach in "Journal of the North China Branch of the Royal Asiatic Society," New Series, No. 2, Dec. 1865, p. 176.

scalding water, the one who suffers the most being convicted, while the innocent is expected to escape with injuries so slight that they will readily heal.[1]

Turning to the still savage races of the old world we everywhere find these superstitions in full force. Africa furnishes an ample store of them, varying from the crudest simplicity to the most deadly devices. Among the Kalabarese the *afia-edet-ibom* is administered with the curved fang of a snake, which is dexterously inserted under the lid and around the ball of the eye of the accused; if innocent, he is expected to eject it by rolling the eye, while, if unable to do so, it is removed with a leopard's tooth, and he is condemned. Even ruder, and more under the control of the operator, is the *afia-ibnot-idiok*, in which a white and a black line are drawn on the skull of a chimpanzee: this is held up before the defendant, when an apparent attraction of the white line towards him demonstrates his innocence, or an inclination of the black line in his direction pronounces his guilt. More formidable than these is the ordeal-nut, containing a deadly poison which causes frothing at the mouth, convulsions, paralysis, and speedy death. In capital cases, or even when sickness is attributed to hostile machinations, the *abiadiong*, or sorcerer, decides who shall undergo the trial; and as the active principle of the nut can be extracted by preliminary boiling, judicious liberality on the part of the individual selected is supposed to render the ordeal comparatively harmless.[2]

Throughout a wide region of Western Africa, one of the most popular forms of ordeal is that of the red water, or "sassy-bark." In the neighborhood of Sierra-Leone, as described by Dr. Winterbottom, it is administered by requiring the accused to fast for twelve hours, and then to swallow a small quantity of rice. After this the infusion of the bark is taken in large quantities, as much as a gallon being sometimes

[1] Griffis's "Mikado's Empire," New York, 1876, p. 92.

[2] Hutchinson's Impressions of Western Africa, London, 1858.

employed ; if it produces emesia, so as to eject all of the rice, the proof of innocence is complete, but if it fails in this, or if it acts as a purgative, the accused is pronounced guilty. It has narcotic properties, also, a manifestation of which is likewise decisive against the sufferer. Among some of the tribes this is determined by placing on the ground small sticks about eighteen inches apart, or by forming an archway of limbs of trees bent to the ground, and requiring the patient to pick his way among them, a feat rendered difficult by the vertiginous effects of the poison. Although death not infrequently results from the ordeal itself, yet the faith reposed in these trials is so absolute that, according to Dr. Livingston, they are demanded with eagerness by those accused of witchcraft, confident in their own innocence and believing that the guilty alone can suffer. When the red water is administered for its emetic effects, the popular explanation is that the fetish enters with the draught, examines the heart of the accused, and, on finding him innocent, returns with the rice as evidence.[1] A system directly the reverse of all this is found in Ashantee, where sickness in the ordeal is a sign of innocence, and the *lex talionis* is strictly observed. When evidence is insufficient to support a charge, the accuser is made to take an oath as to the truth of his accusation, and the defendant is then required to chew a piece of *odum* wood and drink a pitcher of water. If no ill effects ensue, he is deemed guilty, and is put to death; while if he becomes sick, he is acquitted and the accuser suffers in his stead.[2]

[1] Examination of the Toxicological Effects of Sassy-Bark, by Mitchell and Hammond (Proc. Biological Dep. Acad. Nat. Sci. Phila., 1859).—T. Lauder Brunton's Gulstonian Lectures, 1877 (Brit. Med. Journ., March 26, 1877).

This would seem to support the theory of Dr. Patetta (Ordalie, p. 13) that the original form of the poison ordeals was the drinking of water in which a fetish had been washed, the spirit of which was thus conveyed into the person of the accused. On the other hand, there is the fact that in some of the poison ordeals sickness was a proof of innocence.

[2] London Athenæum, May 29, 1875, p. 713.

Further to the east in the African continent, the Niam-Niam and the neighboring tribes illustrate the endless variety of form of which the ordeal is susceptible. These savages resort to various kinds of divination which are equally employed as a guidance for the future in all important undertakings, and as means to discover the guilt or the innocence of those accused of crime. The principal of these is the *borru*, in which two polished pieces of damma wood are rubbed together, after being moistened with a few drops of water. If they glide easily on each other the sign is favorable; if they adhere together it is unfavorable. Life and death are also brought in play, but vicarious victims are made the subject of experiment. Thus a cock is taken and its head is repeatedly immersed in water until the creature is rigid and insensible; if it recovers, the indication is favorable, if it dies, adverse. Or an oil extracted from the bengye wood is administered to a hen, and the same conclusions are drawn from its survival or death.[1]

The Somali of Ethiopia employ the ordeals of red-hot iron and boiling water or oil in virtually the same form as we shall see them used in India and Europe, examining the hand of the accused after twenty-four hours to determine his guilt from its condition.[2]

In Madagascar the poison ordeal is customarily administered, with a decoction of the deadly nut of the Tangena (*Tanghinia venenifera*). One of the modes of its application is evidently based on the same theory as the ordeal of red water and rice, to which it bears a notable resemblance. A fowl is boiled, and three pieces of its skin are placed in the broth. Then a cupful of the decoction of the Tangena nut if given to the accused, followed by the same quantity of the broth, with the pieces of skin. Unless the poison speedily causes vomiting, it soon kills the patient, which is a satisfactory proof of his guilt. If vomiting ensues, it is kept up by repeated doses of the broth and warm water, and if the bits

[1] Schweinfurth's Heart of Africa, New York, 1874, Vol. II. pp. 32–36.

[2] Patetta, Le Ordalie, p. 70.

of skin-are ejected the accused is declared innocent; but if they are retained he is deemed convicted and is summarily despatched with another bowl of the poison. In the persecutions of 1836 and 1849 directed against the Malagasy Christians, many of the converts were tried with the Tangena nut, and numbers of them perished.[1] The ordeals of red-hot iron and boiling water are also used.[2]

Springing from the same belief is the process used in Tahiti for discovering the criminal in cases of theft. The priest, when applied to, digs a hole in the clay floor of his hut, fills it with water, and stands over it with a young plantain in his hand, while invoking his god. The deity thereupon conducts the spirit of the thief over the water, and his reflection is recognized by the priest.[3]

The races of the Indian archipelago are fully equipped with resources of the same kind for settling doubtful cases. Among the Dyaks of Borneo questions for which no other solution is apparent are settled by giving to each litigant a lump of salt, which they drop simultaneously into water, and he whose lump dissolves soonest is adjudged the loser; or each takes a living shell and places it on a plate, when lime-juice is squeezed over them, and the one whose shell first moves under this gentle stimulant is declared the winner.[4]

In the Philippines there are various peculiar ordeals in use. A needle is sometimes thrust into the scalp of two antagonists, and he from whom the blood flows most profusely is adjudged the loser; or two chickens are roasted to death and then opened, and the owner of the one which is found to have the largest liver is defeated.[5]

[1] Philadelphia Evening Bulletin, March 7, 1871.—Ellis's Three Visits to Madagascar, chap. I. VI.

[2] Patetta, Le Ordalie, p. 61.

[3] Ellis's Polynesian Researches, Vol. I. ch. 14.

[4] Königswarter, op. cit. p. 202.—E. B. Tylor, in Macmillan's Magazine, July, 1876.

[5] Patetta, Le Ordalie, p. 61.

The black Australioid Khonds of the hill-districts of Orissa confirm the universality of these practices by customs peculiar to themselves which may be assumed as handed down by tradition from prehistoric times. Not only do they constantly employ the ordeals of boiling water and oil and red-hot iron, which they may have borrowed from their Hindu neighbors, but they administer judicial oaths with imprecations that are decidedly of the character of ordeals. Thus an oath is taken on a tiger's skin with an invocation of destruction from that animal upon the perjured; or upon a lizard's skin whose scaliness is invited upon him who may forswear himself; or over an ant-hill with an imprecation that he who swears falsely may be reduced to powder. A more characteristic ordeal is that used in litigation concerning land, when a portion of earth from the disputed possession is swallowed by each claimant in the belief that it will destroy him whose pretensions are false. On very solemn occasions a sheep is killed in the name of Tari Pennu, the dreadful earth-goddess: rice is then moistened with its blood, and this is administered, in the full conviction that she will slay the rash litigant who insults her power by perjury.[1]

The hill-tribes of Rajmahal, who represent another of the pre-Aryan Indian races, furnish us with further developments of the same principle, in details bearing a marked analogy to those practised by the most diverse families of mankind. Thus the process by which the guilt of Achan was discovered (*Joshua* vii. 16–18), and that by which, as we shall see hereafter, Master Anselm proposed to identify the thief of the sacred vessels of Laon, are not unlike the ceremony used when a district is ravaged by tigers or by pestilence, which is regarded as a retribution for sin committed by some inhabitant, whose identification thus becomes all-important for the salvation of the rest. In the process known as *Satane* a person sits on the ground with a branch of the bale tree planted opposite to him; rice is handed to him to eat in the name of

[1] Macpherson's Memorials of Service in India, London, 1865, p. 83.—See also p. 364 for modes of divination somewhat akin to these.

each village of the district, and when the one is named in which the culprit lives, he is expected to throw up the rice. Having thus determined the village, the same plan is adopted with respect to each family in it, and when the family is identified, the individual is discovered in the same manner. Another form, named *Cherreen*, is not unlike the ordeal of the Bible and key, not as yet obsolete among Christians. A stone is suspended by a string, and the names of the villages, families, and individuals are repeated, when it indicates the guilty by its vibrations. Thieves are also discovered and convicted by these processes, and by another mode known as *Gobereen*, which is a modification of the hot-water ordeal. A mixture of cow-dung, oil, and water is made to boil briskly in a pot. A ring is thrown in, and each suspected person, after invoking the Supreme Deity, is required to find and bring out the ring with his hand—the belief being that the innocent will not be burned, while the guilty will not be able to put his hand into the pot, as the mixture will rise up to meet it.[1]

Among the ancient Aztecs the oath assumed the proportions of an ordeal; the accused in taking it touched with his finger first the ground and then his tongue, and a perjury thus committed was expected to be followed with speedy misfortune. So among the Ostiaks and Samoiedes a disculpatory oath with imprecations taken on the head of a bear is held to have the same virtue.[2]

Reverting to the older races, we find no trace of formal ordeals in the fragmentary remains out of which Egyptologists thus far have succeeded in reconstructing the antique civilization of the Nile valley, but this is not attributable to an intellectual development which had cast them aside as worthless. The intimate dependence of man on the gods, and the daily interposition of the latter in human affairs, were taught by the prophets of the temples and reverently accepted by the people.

[1] Lieut. Shaw, in Asiatic Researches, IV. 67, 84.

[2] Patetta, Le Ordalie, pp. 57, 67.

It was merely a question as to the manner in which the judgment of God was to be obtained, and this apparently took the form of reference to the oracles which abounded in every Egyptian nome. In this we are not left to mere conjecture, for a story related by Herodotus shows that such an interpellation of the divine power was habitual in prosecutions when evidence of guilt was deficient. Aames II., before he gained the crown, was noted for his reckless and dissolute life, and was frequently accused of theft and carried to the nearest oracle, when he was convicted or acquitted according to the response. On ascending the throne, he paid great respect to the shrines where he had been condemned, and neglected altogether those where he had been absolved, saying that the former gave true and the latter lying responses.[1]

The Semitic races, while not giving to the ordeal the development which it has received among the Aryans, still afford sufficient manifestation of its existence among them. Chaldean and Assyrian institutions have not as yet been sufficiently explored for us to state with positiveness whether or not the judgment of God was a recognized resource of the puzzled dispenser of justice; but the probabilities are strongly in favor of some processes of the kind being discovered when we are more fully acquainted with their judicial system. The constant invocation of the gods, which forms so marked a feature of the cuneiform inscriptions, indicates a belief in the divine guidance of human affairs which could hardly fail to find expression in direct appeals for light in the administration of justice. The nearest approach however to the principle of the ordeal which has thus far been deciphered is found in the imprecations commonly expressed in contracts, donations, and deeds, by which the gods are invoked to shed all the curses that can assail humanity on the heads of those who shall evade the execution of their plighted faith, or seek to present false

[1] Herod. II. 174.

claims. Akin to this, moreover, was the penalty frequently expressed in contracts whereby their violation was to be punished by heavy fines, the greater part of which was payable into the treasury of some temple.[1]

Among the Hebrews, as a rule, the interposition of Yahveh was expected directly, without the formulas which human ingenuity has invented to invite and ascertain the decisions of the divine will. Still, the combat of David and Goliath has been cited as a model and justification of the judicial duel; and there are some practices described in Scripture which are strictly ordeals, and which were duly put forth by the local clergy throughout Europe when struggling to defend the system against the prohibitions of the papacy. When the man who blasphemed the Lord (*Levit.* xxiv. 11–16) was kept in ward "that the mind of the Lord might be showed them," and the Lord ordered Moses to have him stoned by the whole congregation, we are not told the exact means adopted to ascertain the will of Yahveh, but the appeal was identical in principle with that which prompted the mediæval judgment of God. The use of the lot, moreover, which was so constantly employed in the most important and sacred matters, was not a mere appeal to chance, but was a sacred ceremony performed "before the Lord at the door of the tabernacle of the congregation" to learn what was the decision of Yahveh.[2] The lot was also used, if not as a regular judicial expedient, at all events in unusual cases as a mode of discovering criminals, and its results were held to be the undoubted revelation of Omniscience. It is more than probable that the Urim and Thummin were lots, and that they were not infrequently used,

[1] Oppert et Ménant, Documents Jurid. de l'Assyrie, Paris, 1877, pp. 93, 106, 122, 136, 191, 197, 209, 238, 242, 246, 250, 253.

It is interesting to compare with these primitive formulas the terrible imprecations which became customary in mediæval charters against those who should seek to impair their observance.

[2] Numb. xxvi. 55–6; xxxiii. 54.—Joshua xviii. 8–11; xix. 1, 10, 17, 24, 51.—I. Chron. xviii. 5–18, 31.—Nehem. x. 34; xi. 1.

as in the cases of Achan and Jonathan.[1] And the popular belief in the efficacy of the lot is manifested in the account of Jonah's adventure (*Jonah* i. 7) when the sailors are described as casting lots to discover the sinner whose presence brought the tempest upon them. The most formal and absolute example of the ordeal, however, was the Bitter Water by which conjugal infidelity was convicted and punished (*Numb.* v. 11–31). This curious and elaborate ceremony, which bears so marked an analogy to the poison ordeals, was abandoned by order of R. Johanan ben Saccai about the time of the Christian era, and is too well known to require more than a passing allusion to the wealth of Haggadistic legend and the interminable controversies and speculations to which it has given rise. I may add, however, that Aben Ezra and other Jewish commentators hold that when Moses burnt the golden calf and made the Israelites drink the water in which its ashes were cast (*Exod.* xxxii. 20), he administered an ordeal, like that of the Bitter Water, which in some way revealed those who had been guilty of idolatry, so that the Levites could slay them; and Selden explains this by reference to a tradition, according to which the gold of the calf reddened the beards of those who had worshipped it, and thus rendered them conspicuous.[2]

The teachings of Mahomet were too directly derived from the later Judaism for him to admit into his jurisprudence any formal system depending on miracles to establish justice between man and man whenever Allah might be invoked to manifest his power. Like the Jews, however, he taught that

[1] Josh. vii. 14-26.—I. Sam. xiv. 37–45. Cf. Michaelis, Laws of Moses, art. 304.—Ewald's Antiq. of Israel, Solly's Translation, pp. 294–6.—Kuenen's Religion of Israel, May's Translation, I. 98.

[2] Mishna, Sota ix. 9; Wagenseilii Comment. op. cit. vi. 4 (Ed. Surenhus. III. 257, 291). The curious who desire further information on the subject can find it in Wagenseil's edition of the Tract Sota, with the Gemara of the Ain Jacob and his own copious and learned notes, Altdorf, 1674.

the constant supervision of the divine power is spontaneously exerted, and he carried this so far as to inculcate the belief that a judge pure from self-seeking would be inspired constantly from above. "He who asks to be made judge will not be assisted; and he who is made judge by compulsion, God sends down to him an angel, who causes his actions and sentences to be just." To one who hesitated to accept the office, the Prophet said, "God will direct your heart, and show you judicial ways, and fix your tongue in truth and justice." On the other hand, when a judge is unjust, "he separates from himself the assistance and favor of God, and the devil is always with him." It was hard on litigants when the tribunal might be presided over by either Allah or Eblis, but they had no recourse, except in the oath, which was the corner-stone of Mahomet's judicial system. In the absence of evidence, the oath of the defendant was final, and this incitement to perjury could only be repressed by investing the oath with the qualities of the ordeal. Accordingly he lost no opportunity of insisting upon the punishment, here and hereafter, of those who perjured themselves before the judgment-seat. Sometimes this failed to deter an eager pleader, and then he consoled the defeated party with the assurance that his successful adversary would suffer in the end, as when the chief of the Cindah tribe urged that a Jew, against whom he brought suit for land unjustly held, would swear falsely, and the Prophet rejoined, "Swearing is lawful, but he who takes a false oath will have no luck in futurity." Tradition relates, however, that frequently he succeeded thus in frightening those who were ready to forswear themselves, as when a man of Hadramut claimed land occupied by a Cindah, and, being without evidence, the defendant was ready to take the oath, when Mahomet interposed, "No one takes the property of another by oath but will meet God with his tongue cut off," and the Cindah feared God and said, "The land is his." In another case, when two men were quarrelling over an inheritance, and neither had a witness, he warned them, "In whose

favor soever I may order a thing which is not his right, then I lay apart for him nothing less than a piece of hell-fire," whereupon each litigant exclaimed, "O messenger of God, I give up my right to him." Sometimes, however, even Mahomet had recourse to a more direct invocation of the supreme power, as in a case wherein two men disputed as to the ownership of an animal, and neither had witnesses, when he directed them to cast lots upon oath.[1]

These cases do not bear out the tradition that, when the Prophet was perplexed beyond his ability, he had the resource of appealing to the angel Gabriel for enlightenment. There is one legend respecting him, however, which manifests the popular belief that in doubtful cases God may be relied on to interpose for the vindication of innocence. A youth brought before Mahomet on an accusation of murder, protested that the act was committed in self-defence. The Prophet ordered the corpse to be entombed, and postponed the trial until the next day. The brethren of the slain, still insisting on vengeance, were then told that they might inflict upon the murderer precisely the same wounds as those which they should find on the body. On opening the sepulchre for the purpose of ascertaining the exact measure of the punishment conceded, they returned affrighted to the judgment-seat, and reported that they had found nothing but the smoke and stench of Gehenna; whereupon Mahomet pronounced that Eblis had carried off the corpse of the guilty, and that the accused was innocent.[2] The prevalence of superstitions kindred to this, in spite of the principles laid down in the law, is shown by the custom which exists among some tribes of Arabs, of employing the ordeal of red-hot iron in the shape of a gigantic spoon, to which, when duly heated, the accused applies his tongue, his guilt or innocence being manifested by his suffering, or

[1] Mishcat ul-Masabih, Matthews's Translation, Calcutta, 1810, vol. II. pp. 221–31.

[2] Loniceri Chron. Turcic. Lib. II. cap. xvii.

escaping injury.[1] A species of vulgar divination, common among the Turks, moreover, belongs to the same category of thought, as it is used in the detection of thieves by observing the marks on wax slowly melted, while certain magic formulas are recited over it.[2]

It is among the Aryan races that we are to look for the fullest and most enduring evidences of the beliefs which developed into the ordeal, and gave it currency from the rudest stages of nomadic existence to periods of polished and enlightened civilization. In the perfect dualism of Mazdeism, the Yazatas, or angels of the good creation, were always prompt to help the pure and innocent against the machinations of Ahriman and his Daevas, their power to do so depending only upon the righteousness of him who needed assistance.[3] The man unjustly accused, or seeking to obtain or defend his right, could therefore safely trust that any trial to which he might be subjected would be harmless, however much the ordinary course of nature would have to be turned aside in order to save him. Thus Zoroaster could readily explain and maintain the ancestral practices, the common use of which by both the Zend and the Hindu branches of the Aryan family points to their origin at a period anterior to the separation between the kindred tribes. In the fragments of the Avesta, which embody what remains to us of the prehistoric law of the ancient Persians, we find a reference to the ordeal of boiling water, showing it to be an accepted legal process, with a definite penalty affixed for him who failed to exculpate himself in it:—

"Creator! he who knowingly approaches the hot, golden, boiling water, as if speaking truth, but lying to Mithra;

"What is the punishment for it?

[1] Königswarter, op. cit. p. 203.

[2] Collin de Plancy, Dictionnaire Infernal, s. v. *Cêromancie.*

[3] The Dinkard, translated by Peshotun Dustoor Behramjee Sunjana, vol. II, p. 65, Bombay, 1876.

"Then answered Ahura-Mazda: Let them strike seven hundred blows with the horse-goad, seven hundred with the craosho-charana!"[1]

The fire ordeal is also seen in the legend which relates how Sudabeh, the favorite wife of Kai Kaoos, became enamored of his son Siawush, and on his rejecting her advances accused him to his father of endeavoring to seduce her. Kai Kaoos sent out a hundred caravans of dromedaries to gather wood, of which two immense piles were built separated by a passage barely admitting a horseman. These were soaked with naphtha and fired in a hundred places, when Siawush mounted on a charger, after an invocation to God, rode through the flames and emerged without even a discoloration of his garments. Sudabeh was sentenced to death, but pardoned on the intercession of Siawush.[2] Another reminiscence of the same ordeal may be traced among the crowd of fantastic legends with which the career of Zoroaster is embroidered. It is related that when an infant he was seized by the magicians, who foresaw their future destruction at his hands, and was thrown upon a huge pile composed of wood, naphtha, and sulphur, which was forthwith kindled; but, through the interposition of Hormazd, "the devouring flame became as water, in the midst of which slumbered the pearl of Zardusht."[3]

In Pehlvi the judicial ordeal was known as *var nirang*, and thirty-three doubtful conjunctures are enumerated as requiring its employment. The ordinary form was the pouring of molten metal on the body of the patient, though sometimes the heated substance was applied to the tongue or the feet.[4] Of

[1] Vendidad, Farg. IV. 156-8. If Prof. Oppert is correct in his rendering of the Medic Behistun inscription, the Zend version of the Avesta is not the original, but a translation made by order of Darius Hystaspes from the ancient Bactrian, which would greatly increase the antiquity attributable to this record of primæval Aryan thought. See "Records of the Past," VII. 109.

[2] Firdusi, Shah-Nameh, XII. 4 (Mohl's Translation, II. 188). Kai Kaoos was the grandfather and immediate predecessor of Cyrus.

[3] The Dabistan, Shea and Troyer's translation, I. 219.

[4] Quoted from the Dinkard by Dr. Haug in Arda-Viraf, p. 145.

the former, a celebrated instance, curiously anticipating the story told, as we shall see hereafter, of Bishop Poppo when he converted the Danes, is related as a leading incident in the reformation of the Mazdiasni religion when the Persian monarchy was reconstructed by the Sassanids. Eighty thousand heretics remained obstinate until Sapor I. was so urgent with his Magi to procure their conversion that the Dustoor Adurabad offered to prove the truth of orthodoxy by suffering eighteen pounds of melted copper to be poured over his naked shoulders if the dissenters would agree to yield their convictions in case he escaped unhurt. The bargain was agreed to, and carried out with the happiest results. Not a hair of the Dustoor's body was singed by the rivulets of fiery metal, and the recusants were gathered into the fold.[1]

Among the Hindu Aryans so thoroughly was the divine interposition expected in the affairs of daily life that, according to the Manava Dharma Sastra, if a witness, within a week after giving testimony, should suffer from sickness, or undergo loss by fire, or the death of a relation, it was held to be a manifestation of the divine wrath, drawn down upon him in punishment for perjured testimony.[2] There was, therefore, no inducement to abandon the resource of the ordeal, of which traces may be found as far back as the Vedic period, in the forms both of fire and red-hot iron.[3] In the Ramayana, when Rama, the incarnate Vishnu, distrusts the purity of his beloved Sita, whom he has rescued from the Rakshasha Ravana, she vindicates herself by mounting a blazing pyre, from which she

[1] Hyde Hist. vet. Persar. Relig. p. 280 (Ed. 1760). See also, Dabistan, I. 305–6.

[2] Bk. VII. st. 108.

[3] Atharva Veda II. 12 (Grill, Hundert Lieder des Atharva Veda, Tübingen, 1879, p. 16).—Khandogya-Upanishad. VI. 16 (Max Müller's Translation, p. 108). In this latter passage there is a philosophical explanation attempted why a man who covers himself with truth is not burnt by the hot iron.

is rescued unhurt by the fire-god, Agni, himself.[1] Manu declares, in the most absolute fashion—

"Let the judge cause him who is under trial to take fire in his hand, or to plunge in water, or to touch separately the heads of his children and of his wife.

"Whom the flame burneth not, whom the water rejects not from its depths, whom misfortune overtakes not speedily, his oath shall be received as undoubted.

"When the Rishi Vatsa was accused by his young half-brother, who stigmatized him as the son of a Sudra, he swore that it was false, and, passing through fire, proved the truth of his oath; the fire, which attests the guilt and the innocence of all men, harmed not a hair of his head, for he spake the truth."

And the practical application of the rule is seen in the injunction on both plaintiff and defendant to undergo the ordeal, even in certain civil cases.[2]

In the more developed code of Vishnu we find the ordeal system exceedingly complicated, pervading every branch of jurisprudence and only limited by the amount at stake or the character or caste of the defendant.[3] Yet Hindu antiquity is so remote and there have been so many schools of teachers that the custom apparently did not prevail in all times and places. One of the most ancient books of law is the Dharmasastra of Gautama, who says nothing of ordeals and relies for proof wholly on the evidence of witnesses, adding the very relaxed rule that "No guilt is incurred in giving false evidence in case the life of a man depends thereon."[4]

This, however, is exceptional, and the ordeal maintained its existence from the most ancient periods to modern times.

[1] Monier Williams, Indian Wisdom, 2d ed. p. 360.

[2] Man. Dharm. Sast. VIII. 114–16, 190.

[3] Institutes of Vishnu, IX.

[4] Institutes of Gautama, XIII. 1, 3, 23 (Bühler's Translation).

So the Vasishtha Dharmasastra is equally ignorant of ordeals and even more immoral in its teaching—"Men may speak an untruth when their lives are in danger or the loss of their whole property is imminent"—Vasishtha XVI. 10, 35 (Bühler's Translation).

Under the name of *purrikeh*, or *parikyah*, it is prescribed in the native Hindu law in all cases, civil and criminal, which cannot be determined by written or oral evidence, or by oath, and is sometimes incumbent upon the plaintiff and sometimes upon the defendant. In its various forms it bears so marked a resemblance to the judgments of God current in mediæval Europe that the further consideration of its use in India may be more conveniently deferred till we come to discuss its varieties in detail, except to add that in Hindu, as in Christian courts, it has always been a religious as well as a judicial ceremony, conducted in the presence of Brahmans, and with the use of invocations to the higher powers.[1]

Buddhism naturally followed the legal institutions which it found established, and accepted the ordeal, though it could scarce form a logical incident in the great system of transmigration whereby the good and evil of the universe distributed itself automatically, without supervision from the thirty-two heavens. We have seen the influence which Buddhism exercised on Chinese materialism, and Tibetan Shamanism could hardly expect to escape it. Thus in Tibet we find the hot water ordeal assume a form which is literally even-handed, and which, if generally enforced, must exert a happily repressive influence over litigation. Both plaintiff and defendant thrust their arms into a caldron of boiling water containing a black and a white stone, the verdict being in favor of him who brings up the white.[2]

The Hellenic tribes had already, in prehistoric times, reached a point of mental development superior to the grosser

[1] See Halhed's Gentoo Code, chap. iii. §§ 5, 6, 9, 10; chap. xviii. (E. I. Company, London, 1776).—Ayeen Akbery, or Institutes of Akbar (Gladwin's Translation, London, 1800), vol. II. pp. 496, sqq. Also a paper by Ali Ibrahim Khan, chief magistrate of Benares, communicated by Warren Hastings to the Asiatic Society in 1784 (Asiatic Researches, I. 389).

[2] Duclos, Mém. sur les Épreuves.

forms of the ordeal as a recognized instrument of judicial investigation. These were replaced, as we have seen in Egypt, by habitual resort to oracles, but that some recollection of the ancestral practices was handed down to later ages is shown by the allusions in the Antigone of Sophocles, when the guards protest to Creon their innocence as to the burial of Polynices, and offer to prove it by the ordeal :—

> "Ready with hands to bear the red-hot iron,
> To pass through fire, and by the gods to swear
> That we nor did the deed, nor do we know
> Who counselled it, or who performed it" (264–267).

And a remnant of the primæval customs was preserved in the solemnities under which litigation was sometimes determined by one of the parties taking an oath on the heads of his children, or with curses on himself and his family, or passing through fire.[1] The poison ordeal, also, was not wholly obsolete. The Gæum or temple of the broad-breasted Earth, Gæa Eurysternus, at Ægæ in Achaia, was served by a priestess who, though not necessarily a virgin, was yet required to preserve strict celibacy when once invested with her sacred functions. If any doubts arose as to her virtue, it was tested with a draught of bull's blood, which speedily wrought her punishment if she was guilty. The same temple also furnished an illustration of ascertaining the divine will by means of the lot, for when a vacancy occurred in the priestship, and there were several applicants, the choice between them was determined by a reference to chance.[2]

Even these traces of the ancient customs of the race disappear among the Latins, though they preserved in full force the habits of thought from which the ordeal took its rise. This is seen in the most solemn form of imprecation known to the Romans as lending irrevocable force to promissory oaths—the "Jovem lapidem jurare,"—whether we take the ceremony

[1] Smith's Dict. of Antiq. s. v. *Martyria.*

[2] Pausan. VII. xxv. 8.

mentioned by Festus, of casting a stone from the hand while adjuring Jupiter to reject in like manner the swearer if he should prove forsworn, or the form described by Livy as preceding the combat between the Horatii and Curiatii, in which a victim was knocked on the head with a stone under a somewhat similar invocation.[1] Even without this ceremony, imprecatory oaths were used which were based on the belief that the gods would take men at their word and punish them, for forswearing themselves, with the evils which they thus invoked. Thus, after the battle of Cannæ, P. Cornelius Scipio forced the nobles who were plotting to leave Italy to abandon their design and take an oath in which they adjured Jupiter to visit them and all belonging to them with the worst of deaths if they proved false.[2] In the legends of Rome, moreover, sporadic instances may be found of special miraculous interposition to decide the question of innocence or guilt, when the gods properly appealed to would intervene to save their worshippers. These manifestations were principally vouchsafed in favor of the Vestals, as when the pupil of Æmilia was accused of having allowed the sacred fire to be extinguished, and was preserved by its spontaneous ignition on her placing the skirt of her garment upon the altar; or when Tucca, falsely arraigned for unchastity, vindicated her purity by carrying water in a sieve; or when Claudia Quinta, under a similar charge, made good her defence by dragging, with a slender cord, a ship against the rapid current of the Tiber after it had run aground and resisted all efforts to move it—and this with an invocation to the goddess to absolve or condemn her, as she was innocent or guilty, which gives to the affair a marked resemblance to an established form of judicial ordeal.[3] Occasional instances such as these had, however, no

[1] Festus s. v. *Lapidem.*—Liv. I. 24; XXI. 45.—Polyb. III. xxv. 6–9.—Aul. Gell. I. 21.

[2] Liv. XXII. 53. Cf. Fest. s. v. *Præjurationes.* See an example of a similar oath taken by a whole army, Liv. ii. 45.

[3] Val. Maxim. I. i. 7; VIII. i. 5.—Ovid. Fastor. IV. 305 sqq.

influence on the forms and principles of Roman jurisprudence, which was based on reason and not on superstition. With the exception of the use of torture, as we shall see hereafter, the accused was not required to exculpate himself. He was presumed to be innocent, and the burden of proof lay not on him but on the prosecutor. The maxim of the civil law—"Accusatore non probante, reus absolvitur"—is entirely incompatible with the whole theory upon which the system of ordeals is based.[1]

The barbarian Aryans who occupied Europe brought with them the ancestral beliefs in a form more easily recognizable than the remnants which survived through Hellenic and Italiote civilization. The Feini, or Irish Celts, boasted that their ancient Brehons, or judges, were warned by supernatural manifestations as to the equity of the judgments which they rendered. Sometimes these took the shape of blotches on their cheeks when they pronounced false judgments. Sen Mac Aige was subject to these marks, but with him they disappeared when he decided righteously, while Sencha Mac Aillila was less fortunate, for he was visited with three permanent blotches for each mistake. Fachtna received the surname of Tulbrethach because, whenever he delivered a false judgment, "if in the time of fruit, all the fruit in the territory in which it happened fell off in one night; if in time of milk, the cows refused their calves; but if he passed a true judgment, the fruit was perfect on the trees." Morann never pronounced a judgment without wearing around his neck a chain, which tightened upon him

[1] A scholiast on Horace, dating probably from the fifth century of our era, describes an ordeal equivalent to the *judicium offæ*. When slaves, he says, were suspected of theft they were taken before a priest who administered to each a piece of bread over which certain conjurations had been uttered and he who was unable to swallow it was adjudged guilty (Patetta, Le Ordalie, p. 140). Not only the date of this deprives it of value as evidence of Roman custom, but also the fact that Romans might well employ such means of influencing the imagination of Barbarian or ignorant slaves.

if the judgment was false, but expanded down upon him if it were true. These quaint legends have their interest as manifesting the importance attached by the ancient Irish to the impartial administration of absolute justice, and the belief entertained that a supernatural power was ever on the watch over the tribunals, but these manifestations were too late to arrest injustice, as they did not occur until after it was committed. The Feini therefore did not abandon the ancient resource of the ordeal, as is shown by a provision in the Senchus Mor, which grants a delay of ten days to a man obliged to undergo the test of boiling water.[1] The Celts of the Rhinelands also had a local custom of determining the legitimacy of children by an ordeal of the purest chance, which became a common-place of Roman rhetoric, and is thus described in the Anthology:—

Θαρσαλέοι Κελτοὶ ποταμῷ ζηλήμονι Ῥήνῳ κ. τ. λ.

Upon the waters of the jealous Rhine
The savage Celts their children cast, nor own
Themselves as fathers till the power divine
Of the chaste river shall the truth make known.
Scarce breathed its first faint cry, the husband tears
Away the new-born babe, and to the wave
Commits it on his shield, nor for it cares
Till the wife-judging stream the infant save,
And prove himself the sire. All trembling lies
The mother, racked with anguish, knowing well
The truth, but forced to risk her cherished prize
On the inconstant waters' reckless swell.[2]

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[1] Senchus Mor. I. 25, 195. Comp. Gloss, p. 199.

[2] Anthol. IX. 125.—Cf. Julian. Imp. Epist. XVI.—Claud. in Rufinum II. 110.—Pliny describes (Nat. Hist. VII. ii.) a somewhat similar custom ascribed to the Pselli, an African tribe who exhaled an odor which put serpents to sleep. Each new-born child was exposed to a poisonous snake, when if it were legitimate the reptile would not touch it, while if adulterine it was bitten. Another version of the same story is given by Ælian (De Nat. Animal. I. lvii.).

The Teutonic tribes, anterior to their conversion, likewise exhibit the ordeal as a recognized resource in judicial proceedings. The Norræna branch, as we have seen, cultivated the *holm-gang*, or duel, with ardor, and they likewise employed the hot-water ordeal, besides a milder form peculiar to themselves entitled the *skirsla*, in which one of the parties to a suit could prove the truth of his oath by passing under a strip of turf raised so that it formed an arch with each end resting on the ground, the belief being that if he had forsworn himself the turf would fall on him as he passed beneath it.[1] The Germanic tribes, in their earliest jurisprudence, afford similar evidence of adherence to the customs of their eastern brethren. The most ancient extant recension of the Salic law may safely be assumed as coeval with the conversion of Clovis, as it is free from all allusions to Christian rules, such as appear in the later versions, and in this the trial by boiling water finds its place as a judicial process in regular use.[2] Among the Bavarians, the decree of Duke Tassilo in 772 condemns as a relic of pagan rites a custom named *stapfsaken*, used in cases of disputed debt, which is evidently a kind of ordeal from the formula employed, "Let us stretch forth our right hands to the just judgment of God!"[3]

The Slavs equally bear witness to the ancestral practice of the ordeal as a judicial process. The *prauda jeliezo*, or hot-iron ordeal, was in use among them in early times.[4] In Bohemia, the laws of Brzetislas, promulgated in 1039, make no allusion to any other form of evidence in contested cases, while in Russia it was the final resort in all prosecutions for murder, theft, and false accusation.[5]

[1] Keyser's Religion of the Northmen, Pennock's Translation, p. 259. The extreme simplicity of the *skirsla* finds its counterpart in modern times in the ordeal of the staff, as used in the Ardennes and described hereafter.

[2] First Test of Pardessus, Tit. liii. lvi.

[3] Decret. Tassilon. Tit. ii. § 7.

[4] Grimm, ap. Pictet, Origines Indo-Européennes, III. 117.

[5] Annal. Saxo ann. 1039.—Ruskaia Prawda, art. 28 (Esneaux, Hist. de Russie, I. 181).

As the Barbarians established themselves on the ruins of the Roman Empire and embraced Christianity they, with one exception, cultivated the institution of the ordeal with increased ardor. This exception is found in the Gothic nations, and is ascribable, as we have seen when treating of the judicial combat, to the influence of the Roman customs and laws which they adopted. For nearly two centuries after their settlement, there is no allusion in their body of laws to any form of ordeal. It was not until 693, long after the destruction of their supremacy in the south of France, and but little prior to their overthrow in Spain by the Saracens, that King Egiza, with the sanction of a Council of Toledo, issued an edict commanding the employment of the *æneum* or ordeal of boiling water.[1]

Various causes were at work among the other tribes to stimulate the favor with which the ordeal was regarded. As respects the wager of battle I have already traced its career as a peculiarly European form of the Judgment of God, which was fostered by the advantage which it gave, in the times of nascent feudalism, to the bold and reckless. With regard to the other forms, one reason for their increased prevalence is doubtless to be found in the universal principle of the Barbarians, in their successive settlements, to allow all races to retain their own jurisprudence, however much individuals might be intermingled, socially and politically. The confusion to which this gave birth is well set forth by St. Agobard, when he remarks that frequently five men shall be found in close companionship, each one owning obedience to a different law. He also states that under the Burgundian rules of procedure, no one was allowed to bear witness against a man of different race.[2] Under these circumstances, in a large proportion of cases there could be no legal evidence attainable, and recourse was had of necessity to the Judgment of God. Even when this rule was not in force, a man who appealed to Heaven against the testimony of a witness of dif-

[1] L. Wisigoth. VI. i. 3.

[2] Lib. adv. Leg. Gundobadi iv. vi.

ferent origin would be apt to find the court disposed to grant his request. If the judge, moreover, was a compatriot of one of the pleaders, the other would naturally distrust his impartiality, and would prefer to have the case decided by the Omniscient whose direct interposition he was taught to regard as undoubted. That the assumed fairness of the ordeal was highly prized under such circumstances we have evidence in the provisions of a treaty between the Welsh and the Saxons, about the year 1000, according to which all questions between individuals of the two races were to be settled in this manner, in the absence of a special agreement between the parties.[1]

The most efficient cause of the increased use of the ordeal was, however, to be found in the Church. With her customary tact, in converting the Barbarians, she adopted such of their customs as she could adapt to Christian belief and practice; and she accepted the ordeal as an undoubted appeal to God, whose response was regarded as unquestionable, warrant being easily found for this in the Jewish practices already described. The pagan ceremonies were moulded into Christian rites, and the most solemn forms of religion were thrown around the rude expedients invented thousands of years before by the Bactrian nomads. Elaborate rituals were constructed, including celebration of mass and impressive prayers, adjurations and exorcisms of the person to undergo the trial and of the materials used in it, and the most implicit faith was inculcated in the interposition of God to defend the right and to punish guilt.[2] The administration of the ordeal being thus reserved for priestly hands, the Church acquired a vastly increased influence as the minister of justice, to say nothing of the revenues thence arising, and the facility with which ecclesiastics could thus defend themselves when legally assailed by their turbulent flocks. We are not without evidence of the manner in which

[1] Senatus Consult. de Monticolis Waliæ c. ii.

[2] A great variety of these *Ordines* will be found in the collections of Baluze, Martène, Pez, Muratori, Spelman, and others. From these we derive most of our knowledge as to the details of the various processes.

the church thus favored the use of this Christianized paganism, and introduced it along with Christianity among people to whom it was previously unknown. Thus among the Turanian Majjars, the laws of King Stephen, promulgated in 1216, soon after his conversion, contain no allusion to the ordeal, but in those of Ladislas and Coloman, issued towards the end of the century, it is found, in its various forms, thoroughly established as a means of legal proof.[1] So, when in the twelfth century Bishop Geroldus converted the Slavs of Mecklenburg, they were at once forbidden to settle questions by oaths taken on trees, fountains, and stones, as before, but were required to bring their criminals before the priest to be tried by the hot iron or ploughshares.[2] Under the Crusaders, the ordeal was carried back towards the home of its birth, even contaminating the Byzantine civilization, and various instances of its use are related by the historians of the Lower Empire to a period as late as the middle of the fourteenth century.

The ingenuity of the church and the superstition of the people increased somewhat the varieties of the ordeal which we have seen employed in the East. Besides the judicial combat, the modes by which the will of Heaven was ascertained may be classed as the ordeal of boiling water, of red-hot iron, of fire, of cold water, of the balance, of the cross, of the *corsnæd* or swallowing bread or cheese, of the Eucharist, of the lot, bier-right, oaths on relics, and poison ordeals. In some of these, it will be seen, a miraculous interposition was required for an acquittal, in others for a condemnation; some depended altogether on volition, others on the purest chance; while others, again, derived their efficacy from the influence exerted over the mind of the patient.

[1] Batthyani Leg. Eccles. Hung T. I. pp. 439, 454.

[2] Anon. Chron. Slavic. cap. xxv. (S. R. German. Septent. Lindenbrog. p. 215).

CHAPTER II.

THE ORDEAL OF BOILING WATER.

The ordeal of boiling water (*æneum, judicium aquæ ferventis, cacabus, caldaria*) is the one usually referred to in the most ancient texts of laws. It was a favorite both with the secular and ecclesiastical authorities, and the manner in which the pagan usages of the ancient Aryans were adopted and rendered orthodox by the Church is well illustrated by the commendation bestowed on it by Hincmar, Archbishop of Reims, in the ninth century. It combines, he says, the elements of water and of fire; the one representing the deluge —the judgment inflicted on the wicked of old; the other authorized by the fiery doom of the future—the day of judgment, in both of which we see the righteous escape and the wicked suffer.[1] There were several minor variations in its administration, but none of them departed to any notable extent from the original form as invented in the East. A caldron of water was brought to the boiling-point, and the accused was obliged with his naked hand to find a small stone or ring thrown into it; sometimes the latter portion was omitted, and the hand was simply inserted, in trivial cases to the wrist, in crimes of magnitude to the elbow; the former being termed the single, the latter the triple ordeal;[2] or, again, the stone was employed, suspended by a string, and the severity of the trial was regulated by the length of the line, a palm's breadth being counted as single, and the distance to the elbow as triple.[3] A good example of the process, in all its

[1] Hincmar. de Divort. Lothar. Interrog. VI.

[2] Dooms of King Æthelstan, iv. cap. 7.

[3] Adjuratio ferri vel aquæ ferventis (Baluz. II. 655).

details, is furnished us by Gregory of Tours, who relates that an Arian priest and a Catholic deacon, disputing about their respective tenets, and being unable to convince each other, the latter proposed to refer the subject to the decision of the *æneum*, and the offer was accepted. Next morning the deacon's enthusiasm cooled, and he mingled his matins with precautions of a less spiritual nature, by bathing his arm in oil, and anointing it with protective unguents. The populace assembled to witness the exhibition, the fire was lighted, the caldron boiled furiously, and a little ring thrown into it was whirled around like a straw in a tornado, when the deacon politely invited his adversary to make the trial first. This was declined, on the ground that precedence belonged to the challenger, and with no little misgiving the deacon proceeded to roll up his sleeve, when the Arian, observing the precautions that had been taken, exclaimed that he had been using magic arts, and that the trial would amount to nothing. At this critical juncture, when the honor of the orthodox faith was trembling in the balance, a stranger stepped forward—a Catholic priest named Jacintus, from Ravenna—and offered to undergo the experiment. Plunging his arm into the bubbling caldron, he was two hours in capturing the ring, which eluded his grasp in its fantastic gyrations; but finally, holding it up in triumph to the admiring spectators, he declared that the water felt cold at the bottom, with an agreeable warmth at the top. Fired by the example, the unhappy Arian boldly thrust in his arm; but the falseness of his cause belied the confidence of its rash supporter, and in a moment the flesh was boiled off the bones up to the elbow.[1]

This was a volunteer experiment. As a means of judicial investigation, the Church, in adopting it with the other ordeals, followed the policy of surrounding it with all the solemnity which her most venerated rites could impart, thus imitating, no doubt unconsciously, the customs of the Hindus, who,

[1] De Gloria Martyrum Lib. I. cap. 81.—Injecta manu, protinus usque ad ipsa ossium internodia caro liquefacta defluxit.

from the earliest times, have made the ordeal a religious ceremony, to be conducted by Brahmans, with invocations to the divine powers, and to be performed by the patient at sunrise, immediately after the prescribed ablutions, and while yet fasting.[1] With the same object, in the European ordeal, fasting and prayer were enjoined for three days previous, and the ceremony commenced with special prayers and adjurations, introduced for the purpose into the litany, and recited by the officiating priests; mass was celebrated, and the accused was required to partake of the sacrament under the fearful adjuration, "This body and blood of our Lord Jesus Christ be to thee this day a manifestation!" This was followed by an exorcism of the water, of which numerous formulas are on record, varying in detail, but all manifesting the robust faith with which man assumed to control the action of his Creator. A single specimen will suffice.

"O creature of water, I adjure thee by the living God, by the holy God who in the beginning separated thee from the dry land; I adjure thee by the living God who led thee from the fountain of Paradise, and in four rivers commanded thee to encompass the world; I adjure thee by Him who in Cana of Galilee by His will changed thee to wine, who trod on thee with His holy feet, who gave thee the name Siloa; I adjure thee by the God who in thee cleansed Naaman, the Syrian, of his leprosy;—saying, O holy water, O blessed water, water which washest the dust and sins of the world, I adjure thee by the living God that thou shalt show thyself pure, nor retain any false image, but shalt be exorcised water, to make manifest and reveal and bring to naught all falsehood, and to make manifest and bring to light all truth; so that he who shall place his hand in thee, if his cause be just and true, shall receive no hurt; but if he be perjured, let his hand be burned with fire, that all men may know the power of our Lord Jesus Christ, who will come, with the Holy Ghost, to judge with fire the quick and the dead, and the world! Amen!"[2]

After the hand had been plunged in the seething caldron, it was carefully enveloped in a cloth, sealed with the signet of

[1] Institutes of Vishnu, IX. 33 (Jolly's Translation).

[2] Formulæ Exorcismorum, Baluz. II. 639 sqq.

the judge, and three days afterwards it was unwrapped, when the guilt or innocence of the party was announced by the condition of the member.[1] By way of extra precaution, in some rituals it is ordered that during this interval holy water and blessed salt be mingled in all the food and drink of the patient —presumably to avert diabolic interference with the result.[2]

The judicial use of this ordeal is shown in a charter of the monastery of Sobrada in Galicia, when, about 987, the Bishop of Lugo claimed of it for his church the manor of Villarplano. After a vain effort to decide the question by evidence, the representatives of the monastery took a solemn oath as to its rights and offered to confirm it by the *pœna caldaria*. In the church of San Juliano some fifty or sixty notables from both sides assembled; a monk named Salamiro was conducted to the boiling caldron by a person representing each claimant, and there he drew forth ten stones from the bubbling water. His arm was sealed up and three or four days later was exhibited uninjured to the assembly. The proof was conclusive and the Bishop of Lugo abandoned his claim.[3]

The justification of this mode of procedure by its most able defender, Hincmar of Reims, is similar in spirit to the above form of adjuration. King Lothair, great-grandson of Charlemagne, desiring to get rid of his wife, Teutberga, accused her of the foulest incest, and forced her to a confession, which she afterwards recanted, proving her innocence by undergoing the ordeal of hot water by proxy. Lothair, nevertheless, married his concubine Waldrada, and for ten years the whole of Europe was occupied with the degrading details of the quarrel, council after council assembling to consider the subject, and the thunders of Rome being freely employed. Hincmar, the most conspicuous ecclesiastic of his day, stood boldly forth in defence of the unhappy queen, and in his

[1] Doom concerning hot iron and water (Laws of Æthelstan, Thorpe, I. 226); Baluze, II. 644.

[2] Martene de Antiq. Eccles. Ritibus, Lib. III. c. vii. Ordo. 19.

[3] Florez, España Sagrada, XIX. 377–8.

treatise "De Divortio Lotharii et Teutbergæ," although no one at the time seriously thought of impugning the authority of ordeals in general, it suited his purpose to insist upon their claims to infallibility. His line of argument shows how thoroughly the pagan custom had become Christianized, and how easily the churchman could find reasons for attributing to God the interposition which his ancestors had ascribed to Mithra, or to Agni, or to Thor. "Because in boiling water the guilty are scalded and the innocent are unhurt, because Lot escaped unharmed from the fire of Sodom, and the future fire which will precede the terrible Judge will be harmless to the Saints, and will burn the wicked as in the Babylonian furnace of old."[1]

In the Life of St. Ethelwold is recorded a miracle, which, though not judicial, yet, from its description by a contemporary, affords an insight into the credulous faith which rendered lawgivers ready to intrust the most important interests to decisions of this nature. The holy saint, while Abbot of Abingdon, to test the obedience of Elfstan the cook of the monastery, ordered him to extract with his hand a piece of meat from the bottom of a caldron in which the conventual dinner was boiling. Without hesitation the monk plunged his hand into the seething mass and unhurt presented the desired morsel to his wondering superior. Faith such as this could not go unrewarded, and Elfstan, from his humble station, rose to the episcopal seat of Winchester.[2]

This form of trial was in use among all the races in whose legislation the *purgatio vulgaris* found place. It is the only mode alluded to in the Salic Law, from the primitive text to the amended code of Charlemagne.[3] The same may be said

[1] "Quia in aqua ignita coquuntur culpabiles et innoxii liberantur incocti, quia de igne Sodomitico Lot justus evasit inustus, et futurus ignis qui præibit terribilem judicem, Sanctis erit innocuus et scelestos aduret, ut olim Babylonica fornax, quæ pueros omnino non contigit."—Interrog. vi.

[2] Vit. S. Æthelwoldi c. x. (Chron. Abingd. II. 259. M. R. Series).

[3] First text of Pardessus, Tit. liii. lvi.; MS. Guelferbyt. Tit. xiv. xvi.; L. Emend. Tit. lv. lix.

of the Wisigoths, as we have already seen; while the codes of the Frisians, the Anglo-Saxons, and the Lombards, all refer cases to its decision.[1] In Iceland, it was employed from the earliest times;[2] in the primitive jurisprudence of Russia its use was enjoined in cases of minor importance,[3] and it continued in vogue throughout Europe until the general discredit attached to this mode of judgment led to the gradual abandonment of the ordeal as a legal process. It is among the forms enumerated in the sweeping condemnation of the whole system, in 1215, by Innocent III. in the Fourth Council of Lateran; but even subsequently we find it prescribed in certain cases by the municipal laws in force throughout the whole of Northern and Southern Germany,[4] and as late as 1282 it is specified in a charter of Gaston of Béarn, conferring on a church the privilege of holding ordeals.[5] At a later date, indeed, it was sometimes administered in a different and more serious form, the accused being expected to swallow the boiling water. I have met with no instances recorded of this, but repeated allusions to it by Rickius show that it could not have been unusual.[6] Another variant is seen in the case of a monk who had brought the body of St. Helena to his convent and was forced to prove its genuineness by complete immersion in boiling water—a trial which he endured successfully.[7]

The modern Hindoo variety of this ordeal consists in casting a piece of gold or a metal ring into a vessel of boiling *ghee*, or sesame oil, of a specified size and depth. Sacrifices are offered to the gods, a mantra, or Vedic prayer, is uttered over the oil, which is heated until it burns a fresh peepul leaf,

[1] L. Frision. Tlt. iii.; L. Æthelredi iv. § 6; L. Lombard. Lib. i. Tit. xxxiii. § 1.

[2] Grágás, Sect. vi. cap. 55.

[3] Ruskaia Prawda, Art. 28.

[4] Jur. Provin. Saxon. Lib. i. art. 39; Jur. Provin. Alamann. cap. xxxvii. §§ 15, 16.

[5] Du Cange. [6] Defens. Probæ Aquæ Frigid. §§ 167, 169, etc.

[7] J. H. Böhmer, Jus. Eccles. Protestantium T. V. p. 597.

and if the person on trial can extract the ring between his finger and thumb, without scalding himself, he is pronounced victorious.[1] In 1783 a case is recorded as occurring at Benares, in which a Brahman accused a linen-painter of theft, and as there was no other way of settling the dispute, both parties agreed to abide by the result of the ordeal. At that time the East India Company was endeavoring to discountenance this superstition, but could not venture to abolish it forcibly, and as persuasion was unavailing the accused was allowed to undergo the experiment, which resulted in his conviction. Not much confidence, however, seems to have been felt in the trial, as the fine incurred by him was not enforced.[2] Of course, under the influence of English rule, this and all other ordeals are legally obsolete, but the popular belief in them is not easily eradicated. So lately as 1867 the Bombay *Gazette* records a case occurring at Jamnuggur, when a camel-driver named Chakee Soomar, under whose charge a considerable sum of money was lost, was exposed by a local official to the ordeal of boiling oil. The authorities, however, took prompt measures to punish this act of cruelty. The *karbharee* who ordered it escaped chastisement by opportunely dying, but the owner of the treasure, who had urged the trial, was condemned to pay to the camel-driver a pension of 100 rupees during life. In 1868 the Madras *Times* chronicled an attempt to revive the practice among the Brahmans of Travancore. About thirty years before it had been abolished by the British authorities, but previous to that time it was performed by placing a small silver ball in a brazen vessel eight inches deep, filled with boiling ghee. After various religious ceremonies, the accused plunged in his hand, and sometimes was obliged to repeat the attempt several times before he could

[1] Ayeen Akbery, II. 498. This work was written about the year 1600 by Abulfazel, vizier of the Emperor Akbar. Gladwin's Translation was published under the auspices of the East India Company in 1800. See also Ali Ibrahim Khan, in Asiatic Researches, I. 398.

[2] Ali Ibrahim Khan, loc cit.

bring out the ball. The hand was then wrapped up in tender palm leaves and examined after an interval of three days. In 1866 some Brahmans in danger of losing caste endeavored to regain their position by obtaining permission to undergo a modification of this trial, substituting cold oil for boiling ghee. The authorities made no objection to this, but the holy society refused to consider it a valid purgation.

Christian faith improved on the simplicity of pagan devices, and was able, through the intermediation of men of supreme sanctity, to induce Heaven to render the ordeal still more miraculous. D'Achery quotes from a contemporary MS. life of the holy Pons, Abbot of Andaone near Avignon, a miracle which relates that one morning after mass, as he was about to cross the Rhone, he met two men quarrelling over a ploughshare, which, after being lost for several days, had been found buried in the ground, and which each accused the other of having purloined and hidden. As the question was impenetrable to human wisdom, Pons intervened and told them to place the ploughshare in the water of the river, within easy reach. Then, making over it the sign of the cross, he ordered the disputant who was most suspected to lift it out of the river. The man accordingly plunged his arm into the stream only to withdraw it, exclaiming that the water was boiling, and showed his hand fearfully scalded, thus affording the most satisfactory evidence of his guilt.[1] St. Bertrand, Bishop of Comminges, adopted a similar method in a case of disputed paternity. A poor woman came to him with a starving infant, which the father refused to recognize or provide for, lest such evidence of sin should render him ineligible for an ecclesiastical benefice. The bishop summoned the offender, who stoutly denied the allegation, until a vessel of cold water was brought and a stone thrown in, when the bishop blessed the water, and ordered the father to take out the stone, saying that the result would show the truth or falsity of his assevera-

[1] D'Achery, Not. 119 ad Opp. Guibert. Noviogent.

tions. Full of confidence, the man plunged in his hand and brought out the stone, with his hand scalded as though the water had been boiling. He promptly admitted his guilt, acknowledged the child, and thenceforth provided for it.[1] Similar to this was the incident which drove the holy St. Gengulphus from the world. While yet a warrior and favorite of King Pepin, during his travels in Italy he was attracted by a way-side fountain, and bought it from the owner, who imagined that it could not be removed from his possessions. On his return to France, Gengulphus drove his staff into the ground near his house, in a convenient place, and on its being withdrawn next day, the obedient stream, which had followed him from Italy, burst forth. He soon learned that during his absence his wife had proved unfaithful to him with a priest, and desiring to test her innocence, he took her to the fountain and told her that she could disprove the reports against her by picking up a hair which lay at the bottom of the pool. She boldly did this, but on withdrawing her hand it was fearfully scalded, the skin and flesh hanging in strips from her finger-ends. He pardoned her and retired from the world, but she was implacable, and took her revenge by inciting her paramour to murder him.[2]

CHAPTER III.

THE ORDEAL OF RED-HOT IRON.

In almost all ages there has existed the belief that under the divine influence the human frame was able to resist the action of fire. Even the sceptic Pliny seems to share the superstition as to the families of the Hirpi, who at the annual sacrifice

[1] Vit. S. Bertrandi Convenar. No. 15 (Martene Ampliss. Collect. VI. 1029–30).

[2] Pet. Cantor. Verb. Abbrev. Not. in cap. lxxviii. (Migne's Patrol. T. CCV. p. 471).

made to Apollo, on Mount Soracte, walked without injury over piles of burning coals, in recognition of which, by a perpetual senatus consultum, they were relieved from all public burdens.[1] That fire applied either directly or indirectly should be used in the appeal to God was therefore natural, and the convenience with which it could be employed by means of iron rendered that the most usual form of the ordeal. As employed in Europe, under the name of *judicium ferri* or *juise* it was administered in two essentially different forms. The one (*vomeres igniti*, *examen pedale*) consisted in laying on the ground at certain distances six, nine, or in some cases twelve, red-hot ploughshares, among which the accused walked barefooted, sometimes blindfolded, when it became an ordeal of pure chance, and sometimes compelled to press each iron with his naked feet.[2] The other and more usual form obliged the patient to carry in his hand for a certain distance, usually nine feet, a piece of red-hot iron, the weight of which was determined by law and varied with the importance of the question at issue or the magnitude of the alleged crime. Thus, among the Anglo-Saxons, in the "simple ordeal" the iron weighed one pound, in the "triple ordeal" three pounds. The latter is prescribed for incendiaries and "morth-slayers" (secret murderers), for false coining, and for plotting against the king's life; while at a later period, in the collection known as the Laws of Henry I., we find it extended to cases of theft, robbery, arson, and felonies in general.[3] In Sweden, for theft, the form known as *trux iarn* was employed, in which

[1] Natur. Histor. L. VII. c. 2.

[2] "Si titubaverit, si singulos vomeres pleno pede non presserit, si quantulumcunque læsa fuerit, sententia proferatur."—Annal. Winton. Eccles. (Du Cange, s. v. *Vomeres*). Six is the number of ploughshares specified in the celebrated trial of St. Cunigunda, wife of the emperor St. Henry II. (Mag. Chron. Belgic.). Twelve ploughshares are prescribed by the Swedish law (Legg. Scan. Provin. Lib. VII. c. 99. Ed. Thorsen. p. 170).

[3] Legg. Æthelstan. iv. § 6; Ætheldred. iii. § 7; Cnut. Secular. § 58; Henrici I. lxvi. 9.

the accused had to carry the red-hot iron and deposit it in a hole twelve paces from the starting-point; in other cases the ordeal was called *scuz iarn*, when he carried it nine paces and then cast it from him. These ordeals were held on Wednesday, after fasting on bread and water on Monday and Tuesday; the hand or foot was washed, after which it was allowed to touch nothing till it came in contact with the iron; it was then wrapped up and sealed until Saturday, when it was opened in presence of the accuser and the judges.[1] In Spain, the iron had no definite weight, but was a palm and two fingers in length, with four feet, high enough to enable the criminal to lift it conveniently.[2] The episcopal benediction was necessary to consecrate the iron to its judicial use. A charter of 1082 shows that the Abbey of Fontanelle in Normandy had one of approved sanctity, which, through the ignorance of a monk, was applied to other purposes. The Abbot thereupon asked the Archbishop of Rouen to consecrate another, and before the latter would consent the institution had to prove its right to administer the ordeal.[3] The wrapping up and sealing of the hand was a general custom, derived from the East, and usually after three days it was uncovered and the decision was rendered in accordance with its condition.[4] These proceedings were accompanied by the same solemn observances which have been already described, the iron itself was duly exorcised, and the intervention of God was invoked in the name of all the manifestations of Divine clemency or wrath by the agency of fire—Shadrach, Meshach, and Abednego, the burning bush of Horeb, the destruction of Sodom, and the day of judgment.[5] Occasionally, when

[1] Legg. Scan. Provin. Lib. VII. c. 99 (Ed. Thorsen, pp. 170–2).

[2] Fuero de Baeça, *ap.* Villadiego, Fuero Juzgo, fol. 317*a*.

[3] Du Cange, s. v. *Ferrum candens*.

[4] Laws of Ethelstan, iv. § 7.—Adjuratio ferri vel aquæ ferventis (Baluz. II. 656).—Fuero de Baeça (*ubi sup.*).

[5] For instance, see various forms of exorcism given by Baluze, II. 651–654. Also Dom Gerbert (Patrologiæ CXXXVIII. 1127); Goldast. Alamann. Antiquitat. T. II. p. 150 (Ed. Senckenberg).

several criminals were examined together, the same piece of heated iron was borne by them successively, giving a manifest advantage to the last one, who had to endure a temperature considerably less than his companions.[1]

In India this was one of the earliest forms of the ordeal, in use even in the Vedic period, as it is referred to in the Khandogya Upanishad of the Sama Veda, where the head of a hatchet is alluded to as the implement employed for the trial —subsequently replaced by a ploughshare.[2] In the seventh century, A. D., Hiouen Thsang reports that the red-hot iron was applied to the tongue of the accused as well as to the palms of his hands and the soles of his feet, his innocence being designated by the amount of resultant injury.[3] This may have been a local custom, for, according to Institutes of Vishnu, closely followed by Yajnavalkya, the patient bathes and performs certain religious ceremonies; then after rubbing his hands with rice bran, seven green asvattha leaves are placed on the extended palms and bound with a thread. A red-hot iron ball or spear-head, weighing about two pounds and three-quarters, is then brought, and the judge adjures it—

"Thou, O fire, dwellest in the interior of all things like a witness. O fire, thou knowest what mortals do not comprehend.

"This man being arraigned in a cause desires to be cleared from guilt. Therefore mayest thou deliver him lawfully from this perplexity."

The glowing ball is then placed on the hands of the accused, and with it he has to walk across seven concentric circles of cow-dung, each with a radius sixteen fingers' breadth larger than the preceding, and throw the ball into a ninth circle, where it must burn some grass placed there for the purpose.

[1] Petri Cantor. Verb. Abbreviat. cap. lxxviii. (Patrol. CCV. 233).

[2] Weber's Hist. of Indian Literature, Mann & Zachariae's Translation, p. 73.

[3] Travels of Hiouen Thsang (Wheeler, Hist. of India, III. 262).

If this be accomplished without burning the hands, he gains his cause, but the slightest injury convicts him. A minimum limit of a thousand pieces of silver was established at an early period as requisite to justify the administration of this form of ordeal in a suit.[1] But the robust faith in the power of innocence characteristic of the earlier Hindus seems to have diminished, for subsequent recensions of the code and later lawgivers increase the protection afforded to the hand by adding to the asvattha leaves additional strata of dharba grass and barley moistened with curds, the whole bound around with seven turns of raw silk.[2] Ali Ibrahim Khan relates a case which he witnessed at Benares in 1783 in which a man named Sancar, accused of larceny, offered to be tried in this manner. The court deliberated for four months, urging the parties to adopt some other mode, but they were obstinate, and being both Hindus claimed their right to the ancient forms of law, which was at last conceded. The ordeal took place in presence of a large assemblage, when, to the surprise of every one, Sancar carried the red-hot ball through the seven circles, threw it duly into the ninth where it burnt the grass, and exhibited his hands uninjured. By way of discouraging such experiments for the future, the accuser was imprisoned for a week.[3] Even in 1873, the Bombay *Gazette* states that this ordeal is still practised in Oodeypur, where a case had shortly before occurred wherein a husbandman had been obliged to prove his innocence by holding a red-hot ploughshare in his hands, duly guarded with peepul leaves, turning his face

[1] Institutes of Vishnu, XI.—Yajnavalkya II. 103–6 (Stenzler's Translation, p. 61).

It is easy to understand the prescription of Vishnu that the fire ordeal is not to be administered to blacksmiths or to invalids, but not so easy that it was forbidden during summer and autumn (Ib. X. 25–6). Yajnavalkya, moreover, says that the ordeals of fire, water, and poison are for Sudras (II. 98).

[2] Ayeen Akbery, II. 497.—Patetta, Le Ordalie, p. 106.

[3] Asiatic Researches, I. 395.

towards the sun and invoking it: "Thou Sun-God, if I am actually guilty of the crime, punish me; if not, let me escape unscathed from the ordeal!"—and in this instance, also, the accused was uninjured.

A peculiar modification of the hot-iron ordeal is employed by the aboriginal hill-tribes of Rajmahal, in the north of Bengal, when a person believes himself to be suffering from witchcraft. The *Satane* and the *Cherreen* are used to find out the witch, and then the decision is confirmed by a person representing the sufferer, who, with certain religious ceremonies, applies his tongue to a red-hot iron nine times, unless sooner burnt. A burn is considered to render the guilt of the accused indubitable, and his only appeal is to have the trial repeated in public, when, if the same result follows, he is bound either to cure the bewitched person or to suffer death if the latter dies.[1]

In the earlier periods of European law, the burning iron was reserved for cases of peculiar atrocity. Thus we find it prescribed by Charlemagne in accusations of parricide;[2] the Council of Risbach in 799 directed its use in cases of sorcery and witchcraft;[3] and among the Thuringians it was ordered for women suspected of poisoning or otherwise murdering their husbands[4]—a crime visited with peculiar severity in almost all codes. In 848 the Council of Mainz indicates it specially for slaves,[5] while the Council of Tribur, in 895, orders it for all cases of accusation against freemen.[6] Among the Anglo-Saxons the accuser had the right to select the ordeal to be employed,[7] while at a later period in Germany this

[1] Lieut. Shaw, in Asiatic Researches, IV. 69.

[2] Capit. Carol. Mag. II. ann. 803, cap. 5.

[3] Concil. Risbach. can. ix. (Hartzheim Concil. German. II. 692).

[4] L. Anglior. et Werinor. Tit. xiv.

[5] Si presbyterum occidit . . . si liber est cum XII. juret; si autem servus per xii. vomeres ignitos se purget.—C. Mogunt, ann. 848 c. xxiv.

[6] Concil. Triburiens. ann. 895 c. 22 (Harduin. Concil. VI. I. 446).

[8] Laws of Ethelred, iv. § 6.

privilege was conferred on the accused.[1] In England it subsequently became rather an aristocratic procedure as contradistinguished from the water ordeals.[2] On the other hand, in the Assises de Jerusalem the hot iron is the only form alluded to as employed in the *roturier* courts;[3] in the laws of Nieuport, granted by Philip of Alsace in 1163, it is prescribed as a plebeian ordeal;[4] and about the same period, in the military laws enacted by Frederic Barbarossa during his second Italian expedition, it appears as a servile ordeal.[5] In the Russian law of the eleventh century, it is ordered in all cases where the matter at stake amounts to more than half a *grivna* of gold, while the water ordeal is reserved for suits of less importance.[6] In the Icelandic code of the twelfth century it is prescribed for men, in cases in which women are required to undergo the hot-water ordeal;[7] while the reverse of this is seen in an English case occurring in 1201, where six men and a woman were accused of burglary; the men were ordered to the water ordeal and the woman to red-hot iron.[8] A specially severe form was provided for women in Ireland, who, when accused,

[1] The Jus Provin. Alaman. (cap. xxxvii. §§ 15, 16; cap. clxxxvi. §§ 4, 6, 7; cap. ccclxxiv.) allows thieves and other malefactors to select the ordeal they prefer. The Jus Provin. Saxon. (Lib. I. art. 39) affords them in addition the privilege of the duel.

[2] Après les serements des parties soloit lon garder la partie, et luy porter a la maine une piece de fer flambant sil fuit frank home, ou de mettre le main ou la pié en eaw boillant s'il ne fuit frank.—Myrror of Justice, cap. III. sect. 23.—Cf. Glanville, Lib. XIV. c. 1.

[3] Baisse Court, cap. 132, 261, 279, 280, etc.

[4] Lesbroussart's Oudegherst, II. 707.

[5] Radevic. de Reb. Frid. Lib. I. cap. xxvi.

[6] Rouskaïa Prawda, Art. 28.

[7] Grágás, Sect. VI. c. lv.

[8] Maitland, Pleas, etc., I. 5. Again in another case in 1207 (p. 55), while in yet another a man and woman, accomplices in the same crime, are both sent to the hot iron (p. 77). In 1203 a case occurs in which the court offers the accused the choice between red-hot iron and water, and he selects the former.—Ib. p. 30.

were obliged to lick with the tongue a bronze axe-head heated to redness in a fire of black-thorn.[1]

Irrespective of these distinctions, we find it to have been the mode usually selected by persons of rank when compelled to throw themselves upon the judgment of God. The Empress Richardis, wife of Charles le Gros, accused in 887 of adultery with Bishop Liutward, offered to prove her innocence either by the judicial combat or the red-hot iron.[2] So when the Emperor St. Henry II. indulged in unworthy doubts of the purity of his virgin-wife St. Cunigunda, she eagerly appealed to the judgment of God, and established her innocence by treading unharmed the burning ploughshares.[3] The tragical tradition of Mary, wife of the Third Otho, contains a similar example, with the somewhat unusual variation of an accuser undergoing an ordeal to prove a charge. The empress, hurried away by a sudden and unconquerable passion for Amula, Count of Modena, in 996, repeated in all its details the story of Potiphar's wife. The unhappy count, unceremoniously condemned to lose his head, asserted his innocence to his wife, and entreated her to clear his reputation. He was executed, and the countess, seeking an audience of the emperor, disproved the calumny by carrying unharmed the red-hot iron, when Otho, convinced of his rashness by this triumphant vindication, immediately repaired his injustice by consigning his empress to the stake.[4] When Edward the

[1] O'Curry, *ap.* Pictet, Origines Indo-Européennes, III. 179.

[2] Regino. ann. 886.—Annales Metenses.

[3] Vit. S. Kunegundæ cap. 2 (Ludewig Script. Rer. German. I. 346–7).

[4] Gotfridi Viterbiensis Pars XVII., "De Tertio Othone Imperatore." Siffridi Epit. Lib. I. ann. 998. Ricobaldi Hist. Impp. sub Ottone III.—The story is not mentioned by any contemporary authorities, and Muratori has well exposed its improbability (Annali d'Italia, ann. 996); although he had on a previous occasion argued in favor of its authenticity (Antiq. Ital. Dissert. 38). In convicting the empress of calumny, the Countess of Modena appeared as an accuser, making good the charge by the ordeal; but if we look upon her as simply vindicating her husband's character, the

Confessor, who entertained a not unreasonable dislike for his mother Emma, listened eagerly to the accusation of her criminal intimacy with Alwyn, Bishop of Winchester, she was condemned to undergo the ordeal of the burning shares, and, walking over them barefooted and unharmed, she established beyond peradventure the falsehood of the charge.[1] So when in 943 Arnoul of Flanders had procured the assassination of William Longsword, Duke of Normandy, at Pecquigny, he offered to Louis d'Outremer to clear himself of complicity in the murder by the ordeal of fire.[2] Robert Curthose, son of William the Conqueror, while in exile during his youthful rebellion against his father, formed an intimacy with a pretty girl. Years afterwards, when he was Duke of Normandy, she presented herself before him with two likely youths, whom she asserted to be pledges of his former affection. Robert was incredulous; but the mother, carrying unhurt the red-hot iron, forced him to forego his doubts and to acknowledge the paternity of the boys, whom he thenceforth adopted.[3] Indeed this was the legal form of proof in cases of disputed paternity established by the Scandinavian legislation at this period,[4] and in that of Spain a century later.[5] Remy, Bishop

case enters into the ordinary course of such affairs. Indeed, among the Anglo-Saxons, there was a special provision by which the friends of an executed criminal might clear his reputation by undergoing the triple ordeal, after depositing pledges, to be forfeited in cases of defeat (Ethelred, iii. § 6), just as in the burgher law of Northern Germany a relative of a dead man might claim the duel to absolve him from an accusation (Sachsische Weichbild, art. lxxxvii.). This was not mere sentiment, as in crimes involving confiscation the estate of the dead man was at stake.

[1] Giles states (note to William of Malmesbury, ann. 1043) that Richard of Devizes is the earliest authority for this story.

[2] Dudon. S. Quintini Lib. iv.

[3] Order. Vitalis Lib. x. cap. 13.

[4] Grágás, Sect. vi. cap. 45. Andreas of Lunden early in the 13th century speaks of it as formerly in vogue for these cases, but disused in his time (Legg. Scan. Provin. Ed. P. G. Thorsen, Kjobenhavn, 1853, p. 110).

[5] " E si alguna dixiere que preñada es dalguno, y el varon no la creyere, prenda fierro caliente; e si quemada fuere, non sea creyda, mas si sana

of Dorchester, when accused of treason against William the Conqueror, was cleared by the devotion of a follower, who underwent the ordeal of hot iron.[1] When, in 1098, William Rufus desired to supply his treasury by confiscations, he accused about fifty of his richest Saxon subjects of having killed deer in his forests and hurried them to the hot-iron ordeal, but he was stupefied when after the third day their hands were found to be unhurt.[2] In 1143, Henry I., Archbishop of Mainz, ordered its employment, and administered it himself, in a controversy between the Abbey of Gerode and the Counts of Hirschberg. In the special charter issued to the abbey attesting the decision of the trial, it is recorded that the hand of the ecclesiastical champion was not only uninjured by the fiery metal, but was positively benefited by it.[3] About the same period, Centulla IV. of Béarn caused it to be employed in a dispute with the Bishop of Lescar concerning the fine paid for the murder of a priest, the ecclesiastic, as usual, being victorious.[4] The reward of the church for its faith in adopting these pagan customs was seen in the well-known case by which Bishop Poppo of Slesvick, in 962, succeeded in convincing and converting the Pagan Danes even as, three thousand years earlier, according to the Persian historians, Zoroaster convinced King Gushtashp of the truth of his revelation from Hormazd,[5] and, within seven centuries, Adurabad converted the heretical Mazdeans. The worthy missionary, dining with King Harold Blaatand, denounced, with more zeal than discretion, the indigenous deities as lying devils. The king dared him to prove his faith in his God, and, on his assenting, caused next morning an immense piece of iron to be duly

escapare del fierro, de el fijo al padre, e criel assi como fuero es."—Fuero de Baeça (Villadiego, Fuero Juzgo, fol. 317*a*).

[1] Roger of Wendover, ann. 1085.

[2] Eadmeri Hist. Novor. Lib. II. (Migne, CLIX. 412).

[3] Gudeni Cod. Diplom. Mogunt. T. I. No. liii.

[4] Mazure et Hatoulet, Fors de Béarn, p. xxxviii.

[5] Hyde Relig. Vet. Persar. cap. xxiv. (Ed. 1760, pp. 320–1).

heated, which the undaunted Poppo grasped and carried around to the satisfaction of the royal court, displaying his hand unscathed by the glowing mass; or, as a variant of the legend asserts, he drew on an iron gauntlet reaching to the elbow and heated to redness. The miracle was sufficient, and Denmark thenceforth becomes an integral portion of Christendom.[1] Somewhat similar, except in its results, was a case in which a priest involved in a theological dispute with a Jew, and unable to overcome him in argument, offered to prove the divinity of Christ by carrying a burning brand in his naked hand. Invoking the name of Jesus, the faithful ecclesiastic drew the blazing wood from the fire and slowly carried it for a considerable distance, but though he triumphantly exhibited his hand unhurt, his obdurate antagonist refused to be converted, alleging that the miracle was the result of magic.[2] In Norway, the sanctity of St. Olaf the King was attested in the same way, when he thoughtlessly whittled a twig on Sunday, and his attention was respectfully called by one of his courtiers to this violation of the sabbatical rules. By way of penance he collected the chips, placed them on the palm of one hand, and set fire to them, but after they had been

[1] Widukindi Lib. III. cap. 65.—Sigebert. Gemblac. Ann. 966.—Dithmari Chron. Lib. II. cap. viii.—Saxo. Grammat. Hist. Danic. Lib. X. The annalists of Trèves claim the merit of this for their archbishop Poppo, whose pontificate lasted from 1016 to 1047. According to their legend, Poppo not only drew on an iron gauntlet heated to redness, but entered a fiery furnace clad only in a linen garment soaked in wax, which was consumed by the flames without injury to him.—Gest. Trevir. Archiep. cap. xvi. (Martene Ampliss. Collect. IV. 161).

[2] Guibert. Noviogent. de Incarnat. contra Judæos Lib. III. cap. xi. Guibert states that he had this from a Jew, who was an eye-witness of the fact.

Somewhat similar was a volunteer ordeal related by Gregory of Tours, when a Catholic disputing with an Arian threw his gold ring into the fire and when heated to redness placed it in his palm with an adjuration to God that if his faith was true it should not hurt him, which of course proved to be the case.—Greg. Turon. de Gloria Confess. c. xiv.

reducēd to ashes, to the surprise of the bystanders, his hand was found unharmed.[1]

In fact, there was scarcely a limit to the credulity which looked for the constant interference of the divine power. About 1215 some heretics at Cambrai were convicted by the hot iron and sentenced to the stake. One of them was of noble birth, and on the way to the place of execution the priest who had conducted the proceedings exhorted him to repentance and conversion. The condemned man listened willingly, and commenced to confess his errors. As he proceeded his hand commenced to heal, and when he had received absolution there remained no trace of the burn. When he was called in turn to take his place at the stake, the priest interposed, saying that he was innocent, and, on examination of the hand, he was released. About the same time a similar occurrence is recorded at Strassburg, where ten heretics had been thus convicted and condemned to be burnt, and one repenting at the last moment was cured of his burn, and was discharged. In this case, however, on his return to his house near the town, his wife upbraided him for his weakness in betraying the eternal truth to avoid a momentary suffering, and under her influence he relapsed. Immediately the burn on his hand reappeared, and a similar one took possession of his wife's hand, scorching both to the bone and inflicting such excruciating agony that being unable to repress their screams, and fearing to betray themselves, they took to the woods, where they howled like wolves. Concealment was impossible, however. They were discovered, carried to the city, where the ashes of their accomplices were not yet cold, and both promptly shared the same fate.[2] Somewhat similar is a case recorded in York, where a woman accused of homicide was exposed to the ordeal, resulting in a blister the size of a half walnut. She was accordingly convicted by a jury of knights,

[1] Legend. de S. Olavo (Langebek II. 548).

[2] Cæsar. Heisterbach. Dial. Mirac. Dist. III. c. xvi. xvii.

but on her offering a prayer at the tomb of St. William of York the blister disappeared. Thereupon the royal justiciaries dismissed her as innocent, and declared the jury to be at the king's mercy for rendering a false verdict.[1]

No form of ordeal was more thoroughly introduced throughout the whole extent of Europe. From Spain to Constantinople, and from Scandinavia to Naples, it was appealed to with confidence as an unfailing mode of ascertaining the will of Heaven. The term *judicium*, indeed, was at length understood to mean an ordeal, and generally that of hot iron, and in its barbarized form, *juise*, may almost always be considered to indicate this particular kind. In the Swedish law of the early 13th century, the red-hot iron was used in a large number of crimes, and the ferocity of its employment is exemplified in the formula prescribed for homicide. A person accused of murder on suspicion was always obliged to justify himself by carrying the hot iron for nine steps; and if he did not appear to stand his trial when duly summoned, he might be forced to undergo a preliminary ordeal to prove that he had been unavoidably detained. If he failed in this, he was condemned as guilty, but if he succeeded in enduring it he was forced to perform the second ordeal to clear him of the crime itself; while the heir of the murdered man, so long as no one succumbed in the trial, could successively accuse ten men; for the last of whom, however, the nine burning ploughshares were substituted.[2] In the code of the Frankish kingdoms of the East, it is the only mode alluded to, except the duel, and it there retained its legal authority long after it had become obsolete elsewhere. The Assises de Jerusalem were in force in the Venetian colonies until the sixteenth century, and the manuscript preserved officially in the archives of Venice, described by Morelli as written in 1436, retains the primitive

[1] Raine's Church of York (English Historical Review, No. 9, p. 159).

[2] Legg. Scan. Provin. Lib. v. c. 57 (Ed. Thorsen, pp. 139–40).

directions for the employment of the *juise*.[1] Even the Venetian translation, commenced in 1531, and finished in 1536, is equally scrupulous, although an act of the Council of Ten, April 10, 1535, shows that these customs had fallen into desuetude and had been formally abolished.[2] In Hungary, the judicial records of Waradin from 1209 to 1235 contain 389 judgments, of which a large part were determined by the hot-iron ordeal.[3]

This ordeal even became partially naturalized among the Greeks, probably as a result of the Latin domination at Constantinople. In the middle of the thirteenth century, the Emperor Theodore Lascaris demanded that Michael Paleologus, who afterwards wore the imperial crown, should clear himself of an accusation in this manner; but the Archbishop of Philadelphia, on being appealed to, pronounced that it was a custom of the barbarians, condemned by the canons, and not to be employed except by the special order of the emperor.[4] Yet George Pachymere speaks of the custom as one not uncommon in his youth, and he describes at some length the ceremonies with which it was performed.[5]

In Europe, even as late as 1310, in the proceedings against the Order of the Templars, at Mainz, Count Frederic, the master preceptor of the Rhenish provinces, offered to substantiate his denial of the accusations by carrying the red-hot iron.[6] In Modena in 1329, in a dispute between the German soldiers of Louis of Bavaria and the citizens, the Germans offered to settle the question by carrying a red-hot bar; but when the townsfolks themselves accomplished the feat, and

[1] This text is given by Kausler, Stuttgard, 1839, together with an older one compiled for the lower court of Nicosia.

[2] Pardessus, Us et Coutumes de la Mer, I. 268 sqq.

[3] Patetta, Le Ordalie, p. 475.

[4] Du Cange, s. v. *Ferrum Candens.*

[5] Pachymeri Hist. Mich. Palæol. Lib. I. cap. xii.

[6] Raynouard, Monuments relatifs à la Condamn. des Chev. du Temple, p. 269.

triumphantly showed that no burn had been inflicted, the Germans denied the proof, and asserted that magic had been employed.[1]

Though about this time it may be considered to have disappeared from the ordinary proceedings of the secular courts, there was one class of cases in which its vitality still continued for a century and a half. The mysterious crime of witchcraft was so difficult of proof that judicial ingenuity was taxed to its utmost to secure conviction, and the Devil was always ready to aid his followers and baffle the ends of justice. The Inquisitor Sprenger, writing in 1487, therefore recommends that, when a witch cannot be forced to confess her guilt by either prayers or torture, she shall be asked whether she will undergo the ordeal of red-hot iron; to this she will eagerly assent, knowing that she can rely on the friendly assistance of Satan to carry her through it unscathed, and this readiness will be good evidence of her guilt. He warns inexperienced judges moreover not to allow the trial to take place, and thus afford to Satan the opportunity of triumph, and instances a case which occurred in 1484 before the Count of Furstenberg. A well-known witch was arrested and tried, but no confession could be extorted from her by all the refinements of torture. Finally she offered to prove her innocence with the red-hot iron, and the Count being young and unwary accepted the proposal, sentencing her to carry it three paces. She carried it for six paces and offered to hold it still longer, exhibiting her hand uninjured. The Count was forced to acquit her, and at the time that Sprenger wrote she was still living, to the scandal of the faithful.[2]

After the judicial use of the red-hot iron had at last died out, the superstition on which it was based still lingered, and men believed that God would reverse the laws of nature to

[1] Bonif. de Morano Chron. Mutinense. (Muratori Antiq. Ital. Diss. 38).

[2] Malleus Maleficar. Francof. 1580, pp. 523–31.

accomplish a special object. About 1670 Georg Frese, a merchant of Hamburg, distinguished for piety and probity, published an account, the truth of which was vouched for by many respectable eye-witnesses, stating that a friend of his named Witzendorff, who had bound himself to a young woman by terrible oaths, and then had proved false and caused her death, fell into a despairing melancholy. He accused himself of the sin against the Holy Ghost, declared that his salvation was impossible, and refused to hope unless he could see a miracle wrought in his behalf. Frese at length asked him what miracle he required, and on his replying that he must see that fire would not burn, the intrepid consoler went to a blazing fire, picked out the burning coals and also a red-hot ring, which he brought to the sinner with uninjured hands and convinced him that he could be saved by repentance. The moral drawn from the facts by the narrator to whom we owe them, is that he who under Divine influence undertakes such ordeals will be preserved unharmed.[1]

Even as we have seen that Heaven sometimes interposed to punish the guilty by a reversal of the hot-water ordeal, so the industrious belief of the Middle Ages found similar miracles in the hot-iron trial, especially when Satan or some other mysterious influence nullified the appeal to God. Early in the thirteenth century a case is related in which a peasant to revenge himself on a neighbor employed a vagabond monk to burn the house of the latter. The hot-iron ordeal was vainly employed on all suspected of the crime; the house was rebuilt, the monk again bribed, burnt it a second time, and again the ordeal proved vain. The owner again rebuilt his house, and kept in it the ordeal-iron, ready for use. The monk, tempted

[1] P. Burgmeister, who relates this in his thesis for the Doctorate (De Probat. per aquam, &c. Ulmæ, 1680), vigorously maintains the truth of the miracle against the assaults of a Catholic controversialist who impugned its authenticity. The affair seems to have attracted considerable attention at the time, as a religious question between the old Church and the Lutherans.

with fresh promises, paid him another visit, and was hospitably received as before, when seeing the piece of iron, his curiosity was aroused and he asked what it was. The host handed it to him, explaining its use, but as soon as the wretch took it, it burned him to the bone, when the other seeing in him the incendiary, seized him; he was duly tried, confessed his guilt, and was broken on the wheel.[1] A variant of this story relates how a man accused of arson offered to prove his innocence by the red-hot iron, which he carried for a long distance and then showed his hand uninjured. The ordeal-iron mysteriously vanished and could not be found, until a year afterwards, when a laborer who was mending the highway came upon it under a layer of sand. It was still glowing fiercely, and when he attempted to pick it up, it burnt him severely. The bystanders at once suspected him of the crime, and on the appropriate means being taken he was forced to confess his guilt, which was duly punished by the wheel.[2] A less tragical example of the same form of miracle was that wrought by the holy Suidger, Bishop of Munster, who suspected his chamberlain of the theft of a cup. As the man stoutly denied his guilt, Suidger ordered him to pick up a knife from the table, after he had mentally exorcised it. The cold metal burnt the culprit's hand as though it had been red-hot, and he promptly confessed his crime.[3]

[1] Cæsar. Heisterb. Dial. Mirac. Dist. x. c. xxxvi.

[2] Godelmanni de Magis Lib. III. cap. v. § 19.

[3] Annalista Saxo ann. 993.

CHAPTER IV.

THE ORDEAL OF FIRE.

The ordeal of fire, administered directly, without the intervention either of water or of iron, is one of the most ancient forms, as is shown by the allusions to it in both the Hindu Vedic writings, the adventure of Siawush, and the passage in the Antigone of Sophocles (pp. 266, 267, 270). In this, its simplest form, it may be considered the origin of the proverbial expression, "J'en mettrois la main au feu," as an affirmation of positive belief,[1] showing how thoroughly the whole system engrained itself in the popular mind. In India, as practised in modern times, its form approaches somewhat the ordeal of the burning ploughshares. A trench is dug nine hands in length, two spans in breadth, and one span in depth. This is filled with peepul wood, which is then set on fire, and the accused walks into it with bare feet.[2] A more humane modification is described in the seventh century by Hiouen-Thsang as in use when the accused was too tender to undergo the trial by red-hot iron. He simply cast into the flames certain flower-buds, when, if they opened their leaves, he was acquitted; if they were burnt up, he was condemned.[3]

An anticipation of the fire ordeal may be found in the Rabbinical story of Abraham when he was cast into a fiery fur-

[1] Thus Rabelais, "en mon aduiz elle est pucelle, toutesfoys ie nen vouldroys mettre mon doigt on feu" (Pantagruel, Liv. II. chap. xv.); and the Epist. Obscur. Virorum (P. II. Epist. 1) "Quamvis M. Bernhardus diceret, quod vellet disputare ad ignem quod hæc est opinio vestra."

[2] Ali Ibrahim Khan (Asiatic Researches, I. 390).

[3] Wheeler's Hist. of India, III. 262.

nace by Nimrod, for reproving the idolatry of the latter, and escaped unharmed from the flames;[1] as well as the similar experience of Shadrach, Mesach, and Abednego, when they were saved from the wrath of Nebuchadnezzar.[2] Miraculous interposition of this kind was expected as a matter of course by the early Christians. About the year 400 Rufinus, in his account of his visit to the monks of the Nitrian desert, tells an adventure of the hermit Copres as related to him by that holy man himself. On visiting a neighboring city he engaged in a disputation with a Manichæan who was perverting the people. Finding the heretic not easily overcome by argument, he proposed that a fire should be built in the public square, into which both should enter. The populace was delighted with the idea and speedily had a roaring pyre ready, when the Manichæan insisted that the Christian should enter first. Copres assented and remained unhurt in the flames for half an hour; his antagonist still held back, when the crowd seized him and tossed him into the fire, where he was severely scorched, and was ejected with disgrace from the city.[3] Almost identical is the story related in 597 A. D., under the Emperor Anastasius, of a Catholic bishop, who, after being worsted in a theological dispute by the subtle logic of an Arian, offered to test the soundness of their respective doctrines by together entering a blazing fire. The prudent Arian declined the proposition, when the enthusiastic Catholic jumped into the burning pile, and thence continued the controversy without suffering the least inconvenience.[4] In the less impressive form of filling the lap with burning coals and carrying them uninjured till they grew cold this ordeal seems to have been a favorite with holy men accused of unchastity. It is related of St. Brice, the successor of St. Martin in the

[1] Targum of Palestine, Gen. xi. (Etheridge's Translation, I. 191–2).—Shalshelet Hakkabala fol. 8*a*. (Wagenseilii Sota p. 192–3).

[2] Daniel, iii. 19–28.

[3] Rufini Historia Monachorum cap. ix.

[4] Theodori Lector. H. E. Lib. II.

see of Tours, of St. Simplicius of Autun, and of Montano bishop of Toledo in the sixth century.[1]

The earliest legal allusion to this form of ordeal in Europe occurs in the code of the Ripuarian Franks, where it is prescribed as applicable to slaves and strangers, in some cases of doubt.[2] From the phraseology of these passages, we may conclude that it was then administered by placing the hand of the accused in a fire. As a legal ordeal this is perhaps the only allusion to it in European jurisprudence, but it was repeatedly resorted to by enthusiasts as a voluntary trial for the purpose of establishing the truth of accusations or of substantiating their position. In these cases it was conducted on a larger and more impressive scale; huge pyres were built, and the individual undergoing the trial literally walked through the flames, as Siawush did. The celebrated Petrus Igneus gained his surname and reputation by an exploit of this kind, which was renowned in its day. Pietro di Pavia, Bishop of Florence, unpopular with the citizens, but protected by Godfrey, Duke of Tuscany, was accused of simony and heresy. Being acquitted by the Council of Rome, in 1063, and the offer of his accusers to prove his guilt by the ordeal of fire being refused, he endeavored to put down his adversaries by tyranny and oppression. Great disturbances resulted, and at length, in 1067, the monks of Vallombrosa, who had borne a leading part in denouncing the bishop, and who had suffered severely in consequence (the episcopal troops having burned the monastery of St. Salvio and slaughtered the cenobites), resolved to decide the question by the ordeal, incited thereto by no less than three thousand enthusiastic Florentines who assembled there for the purpose. Pietro Aldobrandini, a monk of Vallombrosa, urged by his superior, the holy S. Giovanni Gualberto, offered himself to undergo the trial. After im-

[1] Greg. Turon. Hist. Francor. II. 1.—Ejusd. de Gloria Confess. 76.—S. Hildefonsi Toletani Lib. de Viris Illustribus c. iii.

[2] Quodsi servus in ignem manum miserit, et læsam tulerit, etc.—Tit. XXX. cap. i.; also Tit. XXXI.

posing religious ceremonies, he walked slowly between two piles of blazing wood, ten feet long, five feet wide, and four and a half feet high, the passage between them being six feet wide and covered with an inch or two of glowing coals. The violence of the flames agitated his dress and hair, but he emerged without hurt, even the hair on his legs being unsinged, barelegged and barefooted though he was. Desiring to return through the pyre, he was prevented by the admiring crowd, who rushed around him in triumph, kissing his feet and garments, and endangering his life in their transports, until he was rescued by his fellow monks. A formal statement of the facts was sent to Rome by the Florentines, the papal court gave way, and the bishop was deposed; while the monk who had given so striking a proof of his steadfast faith was marked for promotion, and eventually died Cardinal of Albano.[1]

An example of a similar nature occurred in Milan in 1103, when the Archbishop Grossolano was accused of simony by a priest named Liutprand, who, having no proof to sustain his charge, offered the ordeal of fire. All the money he could raise he expended in procuring fuel, and when all was ready the partisans of the archbishop attacked the preparations and carried off the wood. The populace, deprived of the promised exhibition, grew turbulent, and Grossolano was obliged not only to assent to the trial, but to join the authorities in providing the necessary materials. In the Piazza di S. Ambrogio two piles were accordingly built, each ten cubits long, by four cubits in height and width, with a gangway between them of a cubit and a half. As the undaunted priest entered the blazing mass, the flames divided before him and closed as he passed, allowing him to emerge in safety, although with two slight injuries, one a burn on the hand, received while sprinkling the fire before entering, the other on the foot, which he attributed to a kick from a horse in the crowd that awaited his

[1] Vit. S. Johannis Gualberti c. lx.–lxiv.—Berthold. Constantiens. Annal. ann. 1078.

exit. The evidence was accepted as conclusive by the people, and Grossolano was obliged to retire to Rome. Pascal II., however, received him graciously, and the Milanese suffragans disapproved of the summary conviction of their metropolitan, to which they were probably all equally liable. The injuries received by Liutprand were exaggerated, a tumult was excited in Milan, the priest was obliged to seek safety in flight, and Grossolano was restored for a time, but the adverse party prevailed and in spite of papal support he was forced to exile.[1]

A volunteer miracle of somewhat the same character, which is recorded as occurring in Paris early in the thirteenth century, may be alluded to as illustrating the belief of the period. A loose woman in the household of a great noble was luring the youthful retainers to sin, when the chaplain remonstrated with his master, and threatened to depart unless she was removed. When she was taxed with her guilt she defended herself by saying that the priest had accused her because she had refused his importunities, and offered to prove it. Approaching him as a penitent, she sought to seduce his virtue, finally threatening to kill herself unless he would gratify her despairing love, until, to prevent her suicide, he finally made an appointment with her. Secretly announcing her triumph to the noble, she went to the place of meeting, where she found the chaplain mounted on a bed of plank, surrounded by straw and dry wood, to which he set fire on her appearance, and invited her to join him. Covered by the flames, the sinless man felt nothing but a cool, refreshing breeze, and when the pile had burnt out, he emerged unhurt, even his garments and hair being untouched.[2]

But the experiment was not always so successful for the rash enthusiast. In 1098, during the first crusade, after the cap-

[1] Landulph. Jun. Hist. Mediol. cap. ix. x. xi. (Rer Ital. Script. T. V.). —Muratori, Annal. Ann. 1103, 1105.

[2] Cæsar. Heisterb. Dial. Mirac. Dist. x. c. xxxiv.—The same incident is related of St. Francis of Assisi (Vita et Admiranda Historia Seraphici S. P. Francisci, Augsburg, 1694, xxiii.).

ture of Antioch, when the Christians were in turn besieged in that city, and, sorely pressed and famine-struck, were well-nigh reduced to despair, an ignorant peasant named Peter Bartholomew, a follower of Raymond of Toulouse, announced a series of visions in which St. Andrew and the Saviour had revealed to him that the lance which pierced the side of Christ lay hidden in the church of St. Peter. After several men had dug in the spot indicated, from morning until night, without success, Peter leaped into the trench, and by a few well-directed strokes of his mattock exhumed the priceless relic, which he presented to Count Raymond. Cheered by this, and by various other manifestations of Divine assistance, the Christians gained heart, and defeated the Infidels with immense slaughter. Peter became a man of mark, and had fresh visions on all important conjunctures. Amid the jealousies and dissensions which raged among the Frankish chiefs, the possession of the holy lance vastly increased Raymond's importance, and rival princes were found to assert that it was merely a rusty Arab weapon, hidden for the occasion, and wholly undeserving the veneration of which it was the object. At length, after some months, during the leisure of the siege of Archas, the principal ecclesiastics in the camp investigated the matter, and Peter, to silence the doubts expressed as to his veracity, offered to vindicate the identity of the relic by the fiery ordeal. He was taken at his word, and after three days allowed for fasting and prayer, a pile of dry olive-branches was made, fourteen feet long and four feet high, with a passage-way one foot wide. In the presence of forty thousand men all eagerly awaiting the result, Peter, bearing the object in dispute, and clothed only in a tunic, boldly rushed through the flames, amid the anxious prayers and adjurations of the multitude. As the chroniclers lean to the side of the Neapolitan Princes or of the Count of Toulouse, so do their accounts of the event differ; the former asserting that Peter sustained mortal injury in the fire; the latter assuring us that he emerged

safely, with but one or two slight burns, and that the crowd enthusiastically pressing around him in triumph, he was thrown down, trampled on, and injured so severely that he died in a few days, asseverating with his latest breath the truth of his revelations. Raymond persisted in upholding the sanctity of his relic, but it was subsequently lost.[1]

Even after the efforts of Innocent III. to abolish the ordeal, and while the canons of the Council of Lateran were still fresh, St. Francis of Assisi, in 1219, offered himself to the flames for the propagation of the faith. In his missionary trip to the East, finding the Soldan deaf to his proselyting eloquence, he proposed to test the truth of their respective religions by entering a blazing pile in company with some imams, who naturally declined the perilous experiment. Nothing daunted, the enthusiastic saint then said that he would traverse the flames alone if the Soldan would bind himself, in the event of a triumphant result, to embrace the Christian religion and to force his subjects to follow the example. The Turk, more wary than the Dane whom Poppo converted, declined the

[1] Fulcher. Carnot. cap. x.; Radulf. Cadomensis cap. c. ci. cii. cviii.; Raimond. de Agiles (Bongars, I. 150–168). The latter was chaplain of the Count of Toulouse, and a firm asserter of the authenticity of the lance. He relates with pride, that on its discovery he threw himself into the trench and kissed it while the point only had as yet been uncovered. He officiated likewise in the ordeal, and delivered the adjuration as Peter entered the flames: "Si Deus omnipotens huic homini loquutus est facie ad faciem, et beatus Andreas Lanceam Dominicam ostendit ei, cum ipse vigilaret, transeat iste illæsus per ignem. Sin autem aliter est, et mendacium est, comburatur iste cum lancea quam portabit in manibus suis." Raoul de Caen, on the other hand, in 1107 became secretary to the chivalrous Tancred, and thus obtained his information from the opposite party. He is very decided in his animadversions on the discoverers. Foulcher de Chartres was chaplain to Baldwin I. of Jerusalem, and seems impartial, though sceptical.

The impression made by the incident on the popular mind is manifested in the fact that the Nürnberg Chronicle (fol. cxcv.) gives a veritable representation of the lance-head.

proposition, and St. Francis returned from his useless voyage unharmed.[1]

In this St. Francis endeavored unsuccessfully to emulate the glorious achievement of Boniface, the Apostle of Russia, who, according to the current martyrologies, converted the King of Russia to the true faith by means of such a bargain and ordeal.[2] It is a little curious that Peter Cantor, in his diatribe against the judgment of God, presents the supposition of a trial such as this as an unanswerable argument against the system—the Church, he says, could not assent to such an experiment, and therefore it ought not to be trusted in affairs of less magnitude.[3]

Somewhat irregular as a judicial proceeding, but yet illustrating the general belief in the principles of the ordeal of fire, was an occurrence related about the year 1220 by Cæsarius of Heisterbach as having taken place a few years before in Arras. An ecclesiastic of good repute decoyed a goldsmith into his house, and murdered him to obtain possession of some valuables, cutting up the body, with the assistance of a younger sister, and hiding the members in a drain. The crime was proved upon them, and both were condemned to the stake. On the way to the place of punishment, the girl demanded a confessor, and confessed her sins with full contrition, but the brother was obdurate and impenitent. Both were tied to the same stake; the brother was promptly reduced to ashes, while the flames were deliciously cool to the sister, and only burnt the rope with which she was tied, so that she quietly walked down from the pile. The judges, thus convinced of her innocence, dismissed her without further trouble.[4]

From every point of view, however, both as to date and as to consequences, the most remarkable recourse to the fire ordeal was that which proved to be the proximate cause of the

[1] Raynaldi Annal. Eccles. ann. 1219, c. 56.

[2] Martyrol. Roman. 19 Jun.—Petri Damian. Vit. S. Romualdi c. 27.

[3] Petri Cantor. Verb. Abbreviat. cap. lxxviii. (Patrol. CCV. 229).

[4] Cæsar. Heisterbach. Dial. Mirac. Dist. III. c. xv.

downfall of Savonarola. Long after the ordeal system had been superseded in European jurisprudence, and occurring in the centre of the New Learning, it was a most noteworthy illustration of the superstition which formed a common bond between sceptics and religious enthusiasts. In 1498 Savonarola had been silenced by command of Alexander III., his influence with the people was waning, and his faithful follower Fra Domenico da Pescia was desperately struggling in the pulpit to maintain the cause against the assaults of the Franciscans led by the eloquent Fra Francesco della Puglia. Domenico in a sermon offered to prove the truth of his leader's utterances by throwing himself from the roof of the Palazzo de' Signori, by casting himself in the river, or by entering fire. This burst of rhetoric might have passed unheeded had not Fra Francesco taken it up and offered to share the ordeal with Savonarola himself. Savonarola declined, except under impossible conditions, but Domenico accepted the challenge and affixed to the portal of Santa Croce a paper in which he offered to prove by argument or miracle the truth of sundry propositions bearing upon his teacher's mission. To this Fra Francesco replied that he would enter fire with Fra Domenico; that he fully expected to be burnt, but that he would willingly suffer if he could disabuse the people of their false idol. Popular excitement rose to such a height that the Signoria sent for both disputants, and made them sign a written agreement to undergo the ordeal. In this Fra Francesco wisely provided that, although he was willing to enter fire with Savonarola himself, if Domenico was to act he would only produce a champion, who was readily found in the person of Fra Giuliano Rondinelli. On the side of the Dominicans the enthusiasm was so great that all the friars of Savonarola's convent of San Marco, nearly three hundred in number, eagerly signed a pledge to submit to the ordeal, and he assured them that in such a cause they could do so without danger. In fact, when, on the day before the trial, he preached on the

subject in San Marco, the whole audience rose as one man and offered to take Domenico's place.

April 7th was the day fixed for the *Sperimento del Fuoco*. In the Piazza de' Signori a huge pile of wood, plentifully reinforced with gunpowder, sulphur, oil, and spirits, was built with a gangway through which the champions were to pass; it was to be lighted at one end, and after they entered fire was to be set at the other to preclude retreat. All Florence assembled to witness the spectacle, and patiently endured the peltings of a terrible storm. The day was spent, however, in wrangling over questions skilfully raised by the Franciscans, the chief one being whether Fra Domenico should carry in his hand a consecrated host. It had been revealed to one of his brethren that this was indispensable, and Savonarola adhered to it firmly. When evening came the Signoria announced that the ordeal was abandoned. The crowd was enraged at the loss of the promised exhibition; the Dominicans had so confidently promised a miracle that the drawn battle was universally regarded as their defeat, an armed guard was required to protect their return to their convent, and Savonarola's power over the Florentine populace was gone. His enemies lost no time in pushing their advantage. The next evening the mob assailed San Marco; he was seized and conveyed to prison, and after prolonged and repeated tortures he was hanged and burnt on May 23d.[1]

It will be observed that the ordeal of fire was principally affected by ecclesiastics in church affairs, perhaps because it was of a nature to produce a powerful impression on the spectators, while at the same time it could no doubt in many instances be so managed as to secure the desired results by those who controlled the details. In like manner, it was occasionally employed on inanimate matter to decide points

[1] Luca Landucci, Diario Fiorentino, pp. 166–9.—Burlamacchi, Vita di Savonarola (Baluz. et Mansi I. 559–63).—Processo Autentico (Baluz. et Mansi I. 535–42.—Villari, Storia di Gir. Savonarola, II. App. lxxi. lxxv. lxxx. lxxxiii. xc.–xciii.—Diarium Burchardi ann. 1498.—Guicciardini, III. vi.

of faith or polity. Thus, in the question which excited great commotion in Spain, in 1077, as to the substitution of the Roman for the Gothic or Mozarabic rite, after a judicial combat had been fought and determined in favor of the national ritual, the partisans of the Roman offices continued to urge their cause, and the ordeal of fire was appealed to. A missal of each kind was committed to the flames, and, to the great joy of all patriotic Castilians, the Gothic offices were unconsumed.[1] More satisfactory to the orthodox was the result of a similar ordeal during the efforts of St. Dominic to convert the Albigenses. In a dispute with some heretics he wrote out his argument on the points of faith, and gave it to them for examination and reply. That night, as they were seated around the hearth, the paper was produced and read, when one of them proposed that it should be cast into the flames, when, if it remained unconsumed, they would see that its contents were true. This was promptly done, when the saintly document was unharmed. One, more obstinate than the rest, asked for a second and then for a third trial, with the same result. The perverse heretics, however, closed their hearts against the truth, and bound themselves by oath to keep the affair secret; and so glorious a victory for the true faith would have remained unknown but for the indiscretion of one of them, a knight, who had a covert inclination towards orthodoxy.[2] A somewhat similar instance occurred in Constantinople as late as the close of the thirteenth century, when Andronicus II., on his accession, found the city torn into factions relative to the patriarchate, arising from the expulsion of Arsenius, a former patriarch. All attempts to soothe the dissensions proving vain, at length both parties agreed to write out their respective statements and arguments, and, committing both books to the flames, to abide by the result, each side hoping that its manuscript would be preserved by

[1] Roderici Toletani de Reb. Hispan. VI. xxvi. (see ante p. 132).

[2] Pet. Val. Cernaii Hist. Albigens. cap. III.

the special interposition of Heaven. The ceremony was conducted with imposing state, and, to the general surprise, both books were reduced to ashes. Singularly enough, all parties united in the sensible conclusion that God had thereby commanded them to forget their differences and to live in peace.[1]

About the same period as this last example, Samaritan tradition related that the comparative claims of Mt. Gerizim and Al-Qods (Jerusalem) as the sole seats of Yahveh-worship were settled before Nebuchadnezzar, by the ordeal of fire, applied respectively to the Pentateuch and to the later books of the Jewish canon, Sanballat appearing for Ephraim, and Zerubbabel for Judah. The later books were promptly consumed, but the law of Moses emerged twice from the flames unhurt. Zerubbabel, in despair, then spat upon some pages of the index, and cast the Law a third time into the fire, when the leaves thus polluted were burnt, but the book itself leaped unscathed into the bosom of the king, who promptly slew the representatives of Judah, and gave an unhesitating verdict in favor of the Samaritans.[2]

The genuineness of relics was often tested in this manner by exposing them to the action of fire. This custom, like the ordeal itself as a judicial process, finds its original home in the East. When, for instance, the sacred tooth-relic of Buddha was carried to the court of King Pandu at Patali-putta, and its holiness was questioned by the Niganthas, or worshippers of Siva, they tested it by casting it into a pit filled with glowing charcoal "bright and horrid as the hell Roruva"—when the tooth, in place of being consumed to ashes, rose out of the fiery mass resting on a lotus the size of a chariot-wheel.[3] Even Roman unbelief accepted a similar faith respecting the superfluous thumb which ornamented the right foot of King Pyrrhus, the touch of which cured diseases

[1] Niceph. Gregor. Lib. VI.

[2] Chron. Samaritan. c. xlv. (Ed. Juynboll, Lug. Bat. 1848, p. 183).

[3] Dathavansa, chap. III. 11–13 (Sir M. Coomara Swamy's Translation, London, 1874).

of the spleen, and which remained unharmed on the funeral pyre which consumed the rest of his body to ashes. The indestructible supplementary member was thereupon inclosed in a casket, and reverently placed in a temple—the first relic, probably, on record in the western world.[1] At how early an age Christianity adopted the belief which led to this is manifested by the story of the swaddling-cloth of Christ in one of the apocryphal Gospels. The Virgin, being unable, on account of poverty, to make a return for the offerings of the Magi who came to worship the infant Saviour, presented them with one of his swaddling-bands. On their return they placed it in the sacred fire of their altar, and though the flames eagerly embraced it, they left it unharmed and unaltered, whereupon the Magi venerated it, and laid it away among their treasures.[2] On the conversion of the Spanish Arians the experiment was tried on a larger scale. It seems that doubts were felt by the orthodox as to the relics preserved in their churches, and a general regulation was adopted by the Council of Saragossa in 592 that they should be all brought before the bishops and tested by fire—with what result is not recorded.[3]

In such cases the ceremony of the ordeal was conducted with appropriate religious services, including the following prayer, which would seem to show that in its regular form it was not the relic itself, but the cloth in which it was wrapped that was exposed to the test—

Lord Jesus Christ, who art king of kings and lord of lords, and lover of all believers in thee, who art a just judge, strong and powerful, who hast revealed thy holy mysteries to thy priests, and who didst mitigate the flames to the Three Children; concede to us thy unworthy servants and grant our prayers that this cloth or this thread in which are wrapped those bodies of saints, if they are not genuine let them be burned by this fire, and if they are genuine let them escape, so that iniquity shall not prevail over injustice but falsehood shall

[1] Plinii Hist. Natur. L. VII. c. ii.

[2] Gospel of the Infancy, III.

[3] Concil. Cæsar-August. II. ann. 592 c. 2.

succumb to truth, so that thy truth shall be declared to thee and be manifested to us, believers in thee, that we may know thee to be the blessed God in ages everlasting. Amen.[1]

Numerous instances of this superiority of relics to fire are narrated by the pious chroniclers of the middle ages. In 1015 some monastic pilgrims, hospitably received at Monte Cassino on their return from Jerusalem, offered at the shrine of St. Benedict a fragment of the towel with which the Saviour had washed the feet of his disciples. Some of the monks, being incredulous, placed it on burning coals, when it turned fiery red, but, on being removed, returned to its original color, and all doubts as to its authenticity were dispelled.[2] When, in 1065, the pious Egelwin, Bishop of Durham, miraculously discovered the relics of the holy martyr King Oswyn, he gave the hair to Judith, wife of Tosti, Earl of Northumberland, and she with all reverence placed it on a raging fire, whence it was withdrawn, not only uninjured, but marvellously increased in lustre, to the great edification of all beholders.[3] A similar miracle attested the sanctity of King Olaf the Saint, of Norway, when his hair was laid on a pan of live coals, consecrated by Bishop Grimkel, to satisfy the incredulity of Queen Alfifa.[4] Guibert de Nogent likewise relates that, when his native town became honored with the possession of an arm of St. Arnoul, the inhabitants, at first doubting the genuineness of the precious relic, cast it into the flames; when it vindicated its sanctity, not only by being fireproof, but also by leaping briskly away from the coals, testimony which was held to be incontrovertible.[5] The historian of the monastery of Andres informs us that when in 1084 the long-lost remains of the holy virgin Rotruda were miraculously found, and Baldwin I., Count of Guisnes, desired to take the

[1] Martene de Antiquis Ecclesiæ Ritibus Lib. III. c. viii. § 2.

[2] Chron. Casinensis Lib. II. c. xxxiv.

[3] Matthew of Westminster, ann. 1065.

[4] Olaf Haraldss. Saga, ch. 258 (Laing's Heimskringla, II. 349).

[5] Guibert. Noviogent. de Vita sua Lib. III. cap. xxi.

sacred treasure to his town of Guisnes, it refused to be removed until he proposed to place it on a wagon and allow a team of oxen to be divinely guided to the spot where the saint desired to rest. This was accordingly done, and the oxen carried the relics to a little chapel dedicated to St. Medard, where steps were immediately taken to found an abbey. The Seigneur of Andres, however, Baldwin Bochard, on whose lands the chapel lay, foreseeing that a powerful monastery would be a troublesome neighbor, and being an irreligious man, circulated defamatory libels impugning the authenticity of the relics, and finally pursuaded Count Baldwin to have them tested by the ordeal of fire. This was accordingly done, and the genuineness of the holy remains was proved to the satisfaction of all. Bochard and his descendants continued inveterately hostile to St. Rotruda and her monks, but all, without exception, were compelled, upon their death-beds, to contribute a portion of their substance to her honor.[1] The custom continued even until the sixteenth century was well advanced. In the Jeronymite monastery of Valdebran in Catalonia, a piece of the true cross bears inscription that its genuineness was tested with fire by Archbishop Miralles on October 2, 1530.[2]

The persistency of popular belief in this method of ascertaining guilt or innocence is seen as recently as 1811, when a Neapolitan noble, suspecting the chastity of his daughter, exposed her to the ordeal of fire, from which she barely escaped with her life.[3]

[1] Chron. Andrensis Monast. (D'Achery Spicileg. II. 782).

[2] Villanueva, Viage Literario, T. XIX. p. 42.

[3] Patetta, Le Ordalie, p. 34.

CHAPTER V.

THE ORDEAL OF COLD WATER.

THE cold-water ordeal (*judicium aquæ frigidæ*) differed from most of its congeners in requiring a miracle to convict the accused, as in the natural order of things he escaped. The preliminary solemnities, fasting, prayer, and religious rites, were similar to those already described; holy water sometimes was given to the accused to drink; the reservoir of water, or pond, was then exorcised with formulas exhibiting the same combination of faith and impiety, and the accused, bound with cords, was slowly lowered into it with a rope, to prevent fraud if guilty, and to save him from drowning if innocent.[1] According to Anglo-Saxon rule, the length of rope allowed under water was an ell and á half;[2] in one ritual it is directed that a knot be made in the rope at a distance of a long hair from the body of the accused, and if he sinks so as to bring the knot down to the surface of the water, he is cleared;[3] but in process of time nice questions arose as to the precise amount of submergence requisite for acquittal. Towards the close of the twelfth century we find that some learned doctors insisted that sinking to the very bottom of the water was indispensable; others decided that if the whole person were submerged it was sufficient; while others again reasoned that

[1] Hincmar. de Divort. Lothar. Interrog. vi. It may readily be supposed that a skilful management of the rope might easily produce the appearance of floating, when a conviction was desired by the priestly operators.

[2] L. Æthelstani I. cap. xxiii.

[3] Martene de Antiq. Eccles. Ritibus Lib III. c. vii. Ordo 8.

as the hair was an accident or excrement of the body, it had the privilege of floating without convicting its owner, if the rest of the body was satisfactorily covered.[1]

The basis of this ordeal was the belief, handed down from the primitive Aryans, that the pure element would not receive into its bosom any one stained with the crime of a false oath, another form of which is seen in the ancient superstition that the earth would eject the corpse of a criminal, and not allow it to remain quietly interred. The manner in which the church reconciled it to orthodoxy is clearly set forth by Hincmar: "He who seeks to conceal the truth by a lie will not sink in the waters over which the voice of the Lord hath thundered; for the pure nature of water recognizes as impure, and rejects as incompatible, human nature which, released from falsehood by the waters of baptism, becomes again infected with untruth."[2] The baptism in the Jordan, the passage of the Red Sea, and the crowning judgment of the Deluge, were freely adduced in support of this theory, though these latter were in direct contradiction to it; and the most figurative language was boldly employed to give some show of probability to the results expected. Thus, in the elaborate formula which passes under the name of St. Dunstan, the prayer offered over the water metaphorically adjures the Supreme Being—"Let not the water receive the body of him who, released from the weight of goodness, is upborne by the wind of iniquity!"[3]

In India the ordeal of cold water became simply one of endurance. The stream or pond was exorcised with the customary Mantras:—

"Thou O water dwellest in the interior of all things like a witness. O water thou knowest what mortals do not comprehend.

"This man being arraigned in a cause desires to be cleared

[1] Petri Cantor. Verb. Abbreviat. cap. lxxviii. (Patrol. CCV. 233).

[2] De Divort. Lothar. Interrog. vi.

[3] Ordo S. Dunstani Dorobern. (Baluze II. 650).

from guilt. Therefore mayest thou deliver him lawfully from this perplexity."

The patient stood in water up to his middle, facing the East, caught hold of the thighs of a man "free from friendship or hatred" and dived under, while simultaneously an arrow of reed without a head was shot from a bow, 106 fingers' breadth in length, and if he could remain under water until the arrow was picked up and brought back, he gained his cause, but if any portion of him could be seen above the surface he was condemned. Yajnavalkya says this form of ordeal was only used on the Sudras, or lowest caste, while the Ayeen Akbery speaks of it as confined to the Vaisyas, or caste of husbandmen and merchants. According to the Institutes of Vishnu, it was not to be administered to the timid or those affected with lung diseases, nor to those who gained their living by the water, such as fishermen or boatmen, nor was it allowed during the winter.[1]

Although, as we have seen (p. 268), the original cold-water ordeal in India, as described by Manu, was precisely similar to the European form, inasmuch as the guilty were expected to float and the innocent to sink, and although in this shape it prevailed everywhere throughout Europe, and its tenacity of existence rendered it the last to disappear in the progress of civilization, yet it does not make its appearance in any of the earlier codes of the Barbarians. The first allusions to it occur in the ninth century, and it was then so generally regarded as a novelty that documents almost contemporaneous ascribe its invention to the popes of that period. One story is that when

[1] Institutes of Vishnu IX. 29–30, XII.—Yajnavalkya II. 98, 108–9.—Ayeen Akbery, II. 497.—Some unimportant variations in details are given by Ali Ibrahim Khan (As. Researches, I. 390). Hiouen Thsang describes a variant of this ordeal in which the accused was fastened into one sack and a stone in another; the sacks were then tied together and cast into a river, when if the man sank and the stone rose he was convicted, while if he rose and the stone sank he was acquitted (Wheeler's Hist. of India, III. 262).

Leo III. fled in 799 from his rebellious subjects to Charlemagne, and returned to Rome under the latter's protection, the cold-water ordeal was introduced for the purpose of trying the rebels or recovering a treasure which they had stolen.[1] Another version asserts that Eugenius II., who occupied the pontifical throne from 824 to 827, invented it at the request of Louis le Débonnaire, for the purpose of repressing the prevalent sin of perjury.[2] It is further worthy of note that St. Agobard, Archbishop of Lyons, in his treatises against the judgments of God, written a few years before the accession of Eugenius, while enumerating and describing the various methods in use at that time, says nothing about that of cold water.[3] But for the evidence of its pre-existence in the East, we therefore should be justified in assuming that it was an innovation invented by the Church of the ninth century. That it was a novelty is proved by the necessity felt to adduce authority for its use.[4]

At first, its revival promised to be but temporary. Only a few years after its introduction it was condemned by Louis

[1] Canciani Legg. Barbar. T. I. pp. 282–3.—Martene de Antiq. Eccles. Ritibus Lib. III. c. vii. Ord. 9, 16.

[2] Baluze II. 646.—Mabillon Analect. pp. 161–2 (*ap.* Cangium).—Muratori Antiq. Ital. Diss. 38.—Jureti Observat. ad Ivon. Epist. 74. An Ordo printed by Dr. Patetta from an early tenth century MS. (Archivio Giuridico, Vol. XLV.) mixes up Popes Eugenius and Leo, the Emperor Leo and Charlemagne in a manner to show how exceedingly vague were the notions concerning the introduction of the ordeal, "Incipit juditium aqua frigida. Quod dominus eugenius et leo imperator et episcopi vel abbati sive com ti fecerunt . . . . Similiter fecit domnus carolus imperator pro domnus leo papa, etc."

[3] Lib. adv. L. Gundobadi cap. ix.—Lib. contra Judic. Dei. c. i.

[4] Arguments for its earlier use in Europe have been drawn from certain miracles related by Gregory of Tours (Mirac. Lib. I. c. 69–70), but these relate to innocent persons unjustly condemned to drowning, who were preserved, and therefore these cases have no bearing on the matter. The Epistle attributed by Gratian to Gregory I. (c. 7 § 1 Caus. II. q. v.), in which the cold-water ordeal is alluded to, has long since been restored to its true author, Alexander II. (Epist. 122).

le Débonnaire at the Council of Worms, in 829; its use was strictly prohibited, and the *missi dominici* were instructed to see that the order was carried into effect, regulations which were repeated by the Emperor Lothair, son of Louis.[1] These interdictions were of little avail. The ordeal found favor with popular superstition, and Hincmar contents himself with remarking that the imperial prohibition was not confirmed by the canons of authoritative councils.[2] The trial by cold water spread rapidly throughout Europe, and by all the continental races it was placed on an equal footing with the other forms of ordeal. Among the Anglo-Saxons, indeed, its employment has been called in question by some modern writers; but the Dooms of Ethelstan sufficiently manifest its existence in England before the Conquest, while as late as the close of the twelfth century its use would seem to have been almost universal. The assizes of Clarendon in 1166, confirmed at Northampton in 1176, direct an inquest to be held in each shire, and all who are indicted for murder, robbery, harboring of malefactors, and other felonies are to be at once, without further trial, passed through the water ordeal to determine their guilt or innocence.[3]

As we have seen in the case of the iron ordeal, those of water, both cold and hot, were variously described as patrician or plebeian in different times and places. Thus Hincmar, in the ninth century, alludes to the water ordeals as applicable to persons of servile condition;[4] a constitution of the Emperor St. Henry II., about A. D. 1000, in the Lombard law, has a similar bearing;[5] in the eleventh century an Alsatian document,[6] in the twelfth Glanville's treatise on the laws of Eng-

[1] Capit. Wormat. ann. 829, Tit. II. cap. 12.—L. Longobard. Lib. II. Tit. lv. § 31.

[2] De Divort. Lothar. Interrog. vi.

[3] Assisa facta apud Clarendune §§ 1, 2.—Assisa apud Northamtoniam (Gesta Henrici II. T. II. p. cxlix.; T. I. p. 108.—M. R. Series).

[4] Opusc. adv. Hincmar. Laudun. cap. xliii.

[5] L. Longobard. Lib. I. Tit. ix. § 39.

[6] Recess. Convent. Alsat. anno 1051, § 6 (Goldast. Constit. Imp. II. 48).

land,[1] and in the thirteenth the laws of Scotland[2] all assume the same position. This, however, was an innovation ; for in the earliest codes there was no such distinction, a provision in the Salic law prescribing the *æneum*, or hot-water ordeal, even for the Antrustions, who constituted the most favored class in the state.[3] Nor even in later times was the rule by any means absolute. In the tenth century, Sanche, Duke of Gascony, desirous of founding the monastery of Saint Sever, claimed some land which was necessary for the purpose, and being resisted by the possessor, the title was decided by reference to the cold-water ordeal.[4] In 1027, Welf II., Count of Altorf, ancestor of the great houses of Guelf in Italy and England, having taken part in the revolt of Conrad the Younger and Ernest of Suabia, was forced by the Emperor Conrad the Salic to prove his innocence in this manner.[5] About the same period Othlonus relates an incident in which a man of noble birth accused of theft submitted himself to the cold-water ordeal as a matter of course ;[6] while in 1068, at the Council of Vich, in Catalonia, held for the purpose of enforcing the Truce of God, all persons accused of being directly concerned in its violation are directed to be tried by the cold-water ordeal in the Church of San Pedro, without

[1] De Legg. Angliæ Lib. XIV. cap. i.

We have seen above (p. 292), however, that this rule was by no means invariable. In addition to the cases there adduced another may be cited when in 1177 a citizen of London who is qualified as "nobilissimus et ditissimus," accused of robbery, was tried by the water ordeal, and on being found guilty offered Henry II. five hundred marks for a pardon. The dazzling bribe was refused, and he was duly hanged.—Gesta Henrici II. T. I. p. 156.

[2] Regiam Majestatem Lib. IV. cap. iii. § 4.

[3] Text. Herold. Tit. LXXVI.

[4] Mazure et Hatoulet, Fors de Béarn, p. xxxi.

[5] Conrad. Ursperg. sub. Lothar. Saxon.

[6] Quidam illustris vir. — Othlon. de Mirac. quod nuper accidit etc. (Migne's Patrol. T. CXL. p. 242).

distinction of rank.[1] Nearly two centuries later, indeed, when all the vulgar ordeals were falling into disuse, the water ordeal was established among the nobles of Southern Germany, as the mode of deciding doubtful claims on fiefs, and in Northern Germany, for the settlement of conflicting titles to land.[2]

In 1083, during the deadly struggle between the Empire and the Papacy, as personified in Henry IV. and Hildebrand, the imperialists related with great delight that some of the leading prelates of the papal court submitted the cause of their chief to this ordeal. After a three days' fast, and proper benediction of the water, they placed in it a boy to represent the emperor, when to their horror he sank like a stone. On referring the result to Hildebrand, he ordered a repetition of the experiment, which was attended with the same result. Then, throwing him in as a representative of the pope, he obstinately floated during two trials, in spite of all efforts to force him under the surface, and an oath was exacted from all concerned to maintain inviolable secrecy as to the unexpected result.[3]

Perhaps the most extensive instance of the application of this form of ordeal was that proposed when the sacred vessels were stolen from the cathedral church of Laon, as related by a contemporary. At a council convened on the subject, Master Anselm, the most learned doctor of the diocese, suggested that, in imitation of the plan adopted by Joshua at Jericho, a young child should be taken from each parish of the town and be tried by immersion in consecrated water. From each house of the parish which should be found guilty, another child should be chosen to undergo the same process. When the house of the criminal should thus be discovered, all its inmates should be submitted to the ordeal, and the

[1] Concil. Ausonens. ann. 1068 can. vii. (Aguirre, IV. 433).

[2] Juris Feud. Alaman. cap. lxxvii. § 2.—Jur. Prov. Saxon. Lib. III. c. 21.

[3] MS. Brit. Mus. quoted by Pertz in Hugo. Flaviniac. Lib. II.

author of the sacrilege would thus be revealed. This plan would have been adopted had not the frightened inhabitants rushed to the bishop and insisted that the experiment should commence with those whose access to the church gave them the best opportunity to perpetrate the theft. Six of these latter were accordingly selected, among whom was Anselm himself. While in prison awaiting his trial, he caused himself to be bound hand and foot and placed in a tub full of water, in which he sank satisfactorily to the bottom, and assured himself that he should escape. On the day of trial, in the presence of an immense crowd, in the cathedral which was chosen as the place of judgment, the first prisoner sank, the second floated, the third sank, the fourth floated, the fifth sank, and Anselm, who was the sixth, notwithstanding his previous experiment, obstinately floated, and was condemned with his accomplices, in spite of his earnest protestations of innocence.[1]

Although the cold-water ordeal disappears from the statute-book in civil and in ordinary criminal actions together with its kindred modes of purgation, there was one class of cases in which it maintained its hold upon the popular faith to a much later period. These were the accusations of sorcery and witchcraft which form so strange a feature of mediæval and modern society; and its use for this purpose may apparently be traced to various causes. For such crimes, drowning was the punishment inflicted by the customs of the Franks, as soon as they had lost the respect for individual liberty of action which excluded personal punishments from their original code;[2] and in addition to the general belief that the pure element refused to receive those who were tainted with crime, there was in this special class of cases a widely spread superstition that adepts in sorcery and magic

[1] Hermann. de Mirac. S. Mariæ Laudun. Lib. III. cap. 28.

[2] Lodharius . . . Gerbergam, *more maleficorum*, in Arari mergi præcepit.—Nithardi Hist. Lib. I. ann. 834.

lost their specific gravity. Pliny mentions a race of enchanters on the Euxine who were lighter than water—"eosdem præterea non posse mergi ne veste quidam degravatos;"[1] and Stephanus Byzantinus describes the inhabitants of Thebe as magicians who could kill with their breath, and floated when thrown into the sea.[2] To the concurrence of these notions we may attribute the fact that when the cold-water ordeal was abandoned, in the thirteenth century, as a judicial practice in ordinary cases, it still maintained its place as a special mode of trying those unfortunate persons whom their own folly, or the malice and fears of their neighbors, pointed out as witches and sorcerers.[3] No less than a hundred years after the efforts of Innocent III. had virtually put an end to all the other forms of vulgar ordeals, we find Louis Hutin ordering its employment in these cases.[4] At length, however, it fell into desuetude, until the superstitious panic of witchcraft which took possession of the popular mind caused its revival in the second half of the sixteenth century. In 1487, Sprenger, while treating of every possible detail concerning witchcraft and its prosecution, and alluding to the red-hot iron ordeal, makes no reference whatever to cold water or to the faculty of floating possessed by witches, thus showing that it had passed completely out of remembrance as a test in these cases, both popularly and judicially.[5] In 1564, Wier discusses it as though it were in ordinary use in Western Germany, and mentions a recent case wherein a young girl falsely accused was tested in this manner and floated, after which she was tortured until the executioner himself wondered at her power

[1] Plinii Natur. Histor. L. VII. c. ii.

[2] Ameilhon, de l'Épreuve de l'Eau Froide.

[3] In earlier times, various other modes of proof were habitually resorted to. Among the Lombards, King Rotharis prescribed the judicial combat (L. Longobard. Lib. I. Tit. xvi. § 2). The Anglo-Saxons (Æthelstan. cap. VI.) direct the triple ordeal, which was either red-hot iron or boiling water.

[4] Regest. Ludovici Hutini (*ap.* Cangium).

[5] Mall. Maleficarum.

of endurance. As no confession could be extracted, she was discharged, which shows how little real confidence was reposed in the ordeal.[1] Twenty years later, Scribonius, writing in 1583, speaks of it as a novelty, but Neuwald assures us that for eighteen years previous it had been generally employed throughout Westphalia,[2] and in 1579 Bodin alludes to it as a German fashion which, though he believes in its efficacy, he yet condemns as savoring of magic.[3] The crime was one so difficult to prove judicially, and the ordeal offered so ready and so satisfactory a solution to the doubts of timid and conscientious judges, that its resuscitation is not to be wondered at. The professed demonographers, Bodin, Binsfeld, Godelmann, and others, opposed its revival for various reasons, but still it did not lack defenders. In 1583, Scribonius, on a visit to Lemgow, saw three unfortunates burnt as witches, and three other women, the same day, exposed to the ordeal on the accusation of those executed. He describes them as stripped naked, hands and feet bound together, right to left, and then cast upon the river, where they floated like logs of wood. Profoundly impressed with the miracle, in a letter to the magistrates of Lemgow he expresses his warm approbation of the proceeding, and endeavors to explain its rationale, and to defend it against unbelievers. Sorcerers, from their intercourse with Satan, partake of his nature; he resides within them, and their human attributes become altered to his; he is an imponderable spirit of air, and therefore they likewise become lighter than water. Two years later, Hermann Neuwald published a tract in answer to this, gravely confuting the arguments advanced by Scribonius, who, in 1588, returned to the attack with a larger and more elaborate treatise in favor of the ordeal. Shortly after this, Bishop Binsfeld, in his

[1] Wieri de Præstigiis Dæmonum pp. 589, 581.

[2] Scribonii Epist. de Exam. Sagarum. Newald Exegesis Purgat. Sagarum. These tracts, together with Rickius's "Defensio Probæ Aquæ Frigidæ," were reprinted in 1686 at Leipsic, in 1 vol. 4to.

[3] De Magor. Dæmonomania, Basil. 1581, pp. 372, 385.

exhaustive work on witchcraft, states that the process was one in common use throughout Westphalia, and occasionally employed in the Rhinelands. He condemns it, however, on the score of superstition, and the prohibition of all ordeals by the popes, and concludes that any judge making use of it, or any one believing in it, is guilty of mortal sin. Rejecting the explanation of Scribonius, he argues that the floating of the witch is caused by the direct interposition of the Devil himself, who is willing to sacrifice a follower occasionally in order to damn the souls of those who participate in a practice condemned by the Church.[1] Wier, who denied witchcraft, while believing in the active interposition of the Devil, argues likewise that those who float are borne up by demons, but he attributes it to their desire to confirm the popular illusions concerning witchcraft.[2] Another demonographer of the period, Godelmann, does not hesitate to say that any judge resorting to this mode of proof rendered himself liable to a retaliatory action; and he substantiates his opinion as to the worthlessness of the trial by a case within his own experience. In 1588 he was travelling from Prussia to Livonia, when at the castle of a great potentate his host happened to mention that he had condemned a most wicked witch to be burnt the next day. Godelmann, desirous to know whether the proof could be relied on, asked whether the water ordeal had been tried, and on being answered in the negative, urged the experiment. His request was granted, and the witch sank like a stone. Subsequently the noble wrote to him that he had tried it with six other indubitable witches, and that it had failed with all, showing that it was a false indication, which might deceive incautious judges.[3] Oldenkop, on the other hand, relates that he was present when some suspected women

[1] Binsfeldi Tract. de Confess. Malefic. pp. 287–94 (Ed. 1623). He argues that, as the proceeding was unlawful, confessions obtained by means of it were of no legal weight.

[2] Wieri *op. cit.* p. 589.

[3] Godelmanni de Magis Lib. III. cap. v. §§ 30, 35.

were tried in this manner, who all floated, after which one of the spectators, wholly innocent of the crime, to satisfy the curiosity of some nobles who were present, allowed himself for hire to be tied and thrown in, when he likewise floated and could not be made to sink by all the efforts of the officiating executioner.[1] In 1594, a more authoritative combatant entered the arena—Jacob Rickius, a learned jurisconsult of Cologne, who, as judge in the court of Bonn, had ample opportunity of considering the question and of putting his convictions into practice. He describes vividly the perplexities of the judges hesitating between the enormity of the crime and the worthlessness of the evidence, and his elaborate discussions of all the arguments in favor of the ordeal may be condensed into this: that the offence is so difficult of proof that there is no other certain evidence than the ordeal; that without it we should be destitute of absolute proof, which would be an admission of the superiority of the Devil over God, and that anything would be preferable to such a conclusion. He states that he never administered it when the evidence without it was sufficient for conviction, nor when there was not enough other proof to justify the use of torture; and that in all cases it was employed as a prelude to torture—"præparandum et muniendum torturæ viam"—the latter being frequently powerless in consequence of diabolical influences. The deplorable examples which he details with much complacency as irrefragable proofs of his positions show how frequent and how murderous were the cases of its employment, but would occupy too much space for recapitulation here; while the learning displayed in his constant citations from the Scriptures, the Fathers, the Roman and the Canon Law, is in curious contrast with the fatuous cruelty of his acts and doctrines.

[1] P. Burgmeister Dissert. de Probat. per aquam, etc. Ulmæ, 1680, § 44. Burgmeister adopts the explanation of Binsfeld to account for the cases in which witches floated.

In France, the central power had to be invoked to put an end to the atrocity of such proceedings. In 1588, an appeal was taken to the supreme tribunal from a sentence pronounced by a Champenois court, ordering a prisoner to undergo the experiment, and the Parlement, in December, 1601, registered a formal decree against the practice; an order which it found necessary to repeat, August 10, 1641.[1] That this latter was not uncalled for, we may assume from the testimony of Jerôme Bignon, who, writing nearly at the same time, says that, to his own knowledge, within a few years, judges were in the habit of elucidating doubtful cases in this manner.[2] In England, James I. gratified at once his conceit and his superstition by eulogizing the ordeal as an infallible proof in such cases. His argument was the old one, which pronounced that the pure element would not receive those who had renounced the privileges of the water of baptism,[3] and his authority no doubt gave encouragement to innumerable judicial murders. In Scotland, indeed, the indecency of stripping women naked for the immersion was avoided by wrapping them up in a sheet before binding the thumbs and toes together, but a portion of the Bay of St. Andrews is still called the "Witch Pool," from its use in the trial of these unfortunates.[4]

How slowly the belief was eradicated from the minds of even the educated and enlightened may be seen in a learned inaugural thesis presented by J. P. Lang, in 1661, for the Licentiate of Laws in the University of Bâle, in which, dis-

[1] Königswarter, *op. cit.* p. 176.—Bochelli Decr. Eccles. Gallicanæ, Paris, 1609, p. 1211.

[2] "Porro, nostra memoria, paucis abhinc annis, solebant judices reos maleficii accusatos mergere, pro certo habentes incertum crimen hac ratione patefieri."—Notæ ad Legem Salicam.

[3] Tanquam aqua suum in sinum eos non admitteret, qui excussa baptismi aqua se omni illius sacramenti beneficio ultro orbarunt.—Dæmonologiæ Lib. III. cap. vi.

[4] Rogers' Scotland, Social and Domestic, p. 266 (Grampian Club, 1869).

cussing incidentally the question of the cold-water ordeal for witches, he concludes that perhaps it is better to abstain from it, though he cannot question its efficaciousness as a means of investigation.[1] In 1662, N. Brant, in a similar thesis, offered at Giessen, speaks of it as used in some places, chiefly in Westphalia, and argues against it on the ground of its uncertainty.[2] P. Burgmeister, in a thesis presented at Ulm in 1680, speaks of the practice as still continued in Westphalia, and that it was defended by many learned men, from whose opinions he dissents; among them was Hermann Conring, one of the most distinguished scholars of the time, who argued that if prayers and oaths could obtain the divine interposition, it could reasonably be expected in judicial cases of importance.[3] Towards the close of the century it was frequently practised in Burgundy, not as a judicial process, but when persons popularly reputed as sorcerers desired to free themselves from the damaging imputation. In these cases they are frequently reported as floating in spite of repeated efforts to submerge them, and though this evidence of guilt did not lead to a formal trial they would have to abandon the neighborhood. A notarial act of June 5, 1696, records such a trial at Montigny-le-Roi, when six persons offered themselves to the ordeal in the River Senin; two sank and four floated for about half an hour, with hands and feet tied.[4] F. M. Brahm, in 1701, alludes to the ordeal as no longer in use;[5] but in 1714, J. C. Nehring describes it as nearly, though not quite obsolete, and considers it worthy of an elaborate discussion. He disapproves of it, though he records a case which occurred a few years previously, in which a woman accused of witchcraft managed to escape

[1] Dissert. Inaug. de Torturis Th. XVIII. § xi. Basil. 1661.

[2] N. Brandt de Legitima Maleficos et Sagas investigandi et convincendi ratione, Giessen, 1662.

[3] P. Burgmeister Dissert. de Probat. per aquam ferventem et frigidam, §§ 29, 39–41, Ulmæ, 1680.

[4] Le Brun, Histoire critique des Pratiques Superstitieuses, pp. 526–36 (Rouen, 1702).

[5] F. M. Brahm de Fallacibus Indiciis Magiæ, Halæ Magdeburg. 1709.

from her chains, and went into the water to try herself, and could not be submerged. Notwithstanding this he declares that even when a prisoner demands the ordeal, the judge who grants it is guilty of mortal sin, for the Devil often promises witches to save them in this manner, and, though he very rarely keeps his promise, still he thus succeeds in retaining men in superstitious observances. The success of the ordeal thus is uncertain, and his conclusion is that laws must be made for the generality of cases, and not for exceptional ones.[1] In 1730 thirteen persons were exposed to the cold-water ordeal at Szegedin, in Hungary, and though their guilt was proved by it, any remaining doubts were settled by submitting them to the balance ;[2] and five years later Ephraim Gerhardt alludes to it as everywhere in daily use in such cases.[3] Even in the middle of the century, the learned and pious Muratori affirms his reverent belief in the miraculous convictions recorded by the mediæval writers as wrought in this manner by the judgment of God ; and he further informs us that it was common in his time throughout Transylvania, where witches were very numerous ;[4] while in West Prussia, as late as 1745, the Synod of Culm describes it as a popular abuse in frequent use, and stringently forbids it for the future.[5]

Although, within the last hundred years, the cold-water ordeal has disappeared from the authorized legal procedures of Europe, still the popular mind has not as yet altogether overcome the superstitions and prejudices of so many ages,

[1] J. C. Nehring de Indiciis, Jenæ, 1714.

[2] J. H. Böhmer, Jur. Eccles. Protestant. T. V. p. 608.

[3] Per aquam, tum frigidam ut hodiernum passim in sagarum inquisitionibus. —Eph. Gerhardi Tract. Jurid. de Judic. Duellico, cap. i. § 4 (Francof. 1735).

[4] Antiq. Ital. Dissert. 38.

[5] Qui ex levi suspicione, in tali crimine delatas, nec confessas, nec convictas, ad torturas, supernatationem aquarum, et alia eruendæ veritatis media, tandem ad ipsam mortem condemnare . . . non verentur, exempla proh dolor! plurima testantur.—Synod. Culmens. et Pomesan. ann. 1745, c. v. (Hartzheim Concil. German. X. 510).

and occasionally in some benighted spot a case occurs to show us that mediæval ignorance and brutality still linger amid the triumphs of modern civilization. In 1815 and 1816, Belgium was disgraced by trials of the kind performed on unfortunates suspected of witchcraft;[1] and in 1836, the populace of Hela, near Dantzic, twice plunged into the sea an old woman reputed to be a sorceress, and as the miserable creature persisted in rising to the surface, she was pronounced guilty, and was beaten to death.[2] Even in England it is not many years since a party of credulous people were prosecuted for employing the water ordeal in the trial of a woman whom they believed to be a witch.[3]

In Montenegro and Herzegovina the practice continued till the middle of the present century. Any unusual mortality of children was attributed to sorcery by women: in such cases the head of a village assembled all the men and exhorted them to bring next morning their wives and mothers to the nearest water—a lake or a river, or if necessary a well. The women were then examined one by one, by passing a rope under the arms and tossing them in, without divesting them of their clothes. Those who were so ill-advised as not to sink were pronounced guilty, and were liable to lapidation if they would not swear to abandon their evil practices. The belief even extended to the dominant Turks who, in 1857 at Trebinje, compelled the Christians to bring all their women to the river and cast them in. Buoyed up by their garments seven floated, and these were only saved from stoning by the archimandrite Eustache, who administered to them a solemn oath of abstinence from witchcraft. Austrian domination has rendered all such proceedings unlawful of late years, but in the remoter districts they are said to be still occasionally practised.[4]

[1] Meyer, Institutions Judiciaires, I. 321.

[2] Königswarter, op. cit. p. 177.

[3] Spottiswoode Miscellany, Edinburgh, 1845, II. 41.

[4] V. Bogisic, in Mélusine, T. II. pp. 6–7.

Perhaps we may class as a remnant of this superstition a custom described by a modern traveller as universal in Southern Russia. When a theft is committed in a household, the servants are assembled, and a sorceress, or *vorogeia*, is sent for. Dread of what is to follow generally extorts a confession from the guilty party without further proceedings, but if not, the *vorogeia* places on the table a vase of water and rolls up as many little balls of bread as there are suspected persons present. Then, taking one of the balls, she addresses the nearest servant—"If you have committed the theft, this ball will sink to the bottom of the vase, as will your soul in Hell; but if you are innocent, it will float on the water." The truth or falsehood of this assertion is never tested, for the criminal invariably confesses before his turn arrives to undergo the ordeal.[1]

CHAPTER VI.

THE ORDEAL OF THE BALANCE.

We have seen above that a belief existed that persons guilty of sorcery lost their specific gravity, and this superstition naturally led to the use of the balance in the effort to discover and punish the crime of witchcraft, which all experts assure us was the most difficult of all offences on which to obtain evidence. The trial by balance, however, was not a European invention. Like nearly all the other ordeals, it can be traced back to India, where, at least as early as the time of the Institutes of Vishnu, it was in common use. It is described there as reserved for women, children, old men, invalids, the blind, the lame, and the privileged Brahman caste, and not to be undertaken when a wind was blowing. After proper ceremonies the patient was placed in one scale, with an equivalent

[1] Hartausen, Études sur la Russie (Du Boys, Droit Criminel des Peuples Modernes, I. 256).

weight to counterbalance him in the other, and the nicety of the operation is shown by the prescription that the beam must have a groove with water in it, evidently for the purpose of detecting the slightest deflection either way. The accused then descended and the judge addressed the customary adjuration to the balance :—

"Thou, O balance, art called by the same name as holy law (dharma); thou, O balance, knowest what mortals do not comprehend.

"This man, arraigned in a cause, is weighed upon thee. Therefore mayest thou deliver him lawfully from this perplexity."

Then the accused was replaced in the scale, and if he were found to be lighter than before he was acquitted. If the scale broke, the trial was to be repeated.[1]

It will be seen here that lightness was an evidence of innocence, but in Europe the ordeal was reversed in consequence of the belief that sorcerers became lighter than water. Rickius, writing in 1594, speaks of this mode of trial being commonly used in many places in witchcraft cases, and gravely assures us that very large and fat women had been found to weigh only thirteen or fifteen pounds;[2] but even this will scarcely explain the modification of the process as employed in some places, which consisted in putting the accused in one scale and a Bible in the other.[3] Kœnigswarter assures us that the scales formerly used on these occasions are still to be seen at Oudewater in Holland.[4] In the case already referred to as occurring July 30, 1728, at Szegedin in Hungary, thirteen persons, six men and seven women, were burnt alive for witch-

[1] Institutes of Vishnu, x.—In the code of Yajnavalkya (II. 100–102) there are some differences in the process, but the statement in the text is virtually the same as that in the Ayeen Akbery (II. 486) as in force in the seventeenth century.

[2] Rickii Defens. Probæ Aq. Frigidæ, § 41.

[3] Collin de Plancy, Dict. Infernal, s. v. *Bibliomancie.*

[4] Kœnigswarter, *op. cit.* p. 186.

craft, whose guilt had been proved, first by the cold-water ordeal and then by that of the balance. We are told that a large and fat woman weighed only one and a half drachms and her husband five drachms and the rest varied from a penny-weight to three drachms and under. One of the victims was a man of 82, a local judge, who had previously borne an unblemished character.[1] The use of the Bible as a counterpoise is on record even as lately as the year 1759, at Aylesbury in England, where one Susannah Haynokes, accused of witchcraft, was formally weighed against the Bible in the parish church.[2]

CHAPTER VII.

THE ORDEAL OF THE CROSS.

THE ordeal of the cross (*judicium crucis, stare ad crucem*) was one of simple endurance and differed from all its congeners, except the duel, in being bilateral. The plaintiff and defendant, after appropriate religious ceremonies and preparation, stood with uplifted arms before a cross, while divine service was performed, victory being adjudged to the one who was able longest to maintain his position. An ancient formula for judgments obtained in this manner in cases of disputed titles to land prescribes the term of forty-two nights for the trial.[3] It doubtless originated in the use of this exercise by the Church both as a punishment and as a penance.[4] Of its use as an ordeal the earliest instance which I have observed occurs in a Capitulary of Pepin le Bref, in 752, where it is prescribed in cases of application by a wife for dissolution of

[1] J. H. Böhmer, Jur. Eccles. Protestant. T. V. p. 608.

[2] E. B. Tylor in Macmillan's Magazine, July, 1876.

[3] Formulæ Bignonianæ, No. xii.

[4] Vit. S. Lamberti (Canisii et Basnage, II. 140).—Pseudo Bedæ Lib. de Remed. Peccator. Prologus (Wasserschleben, Bussordnungen, Halle, 1851, p. 248).

marriage.[1] Charlemagne appears to have regarded it with much favor, for he not only frequently refers to it in his edicts, but, when dividing his mighty empire, in 806, he directs that all territorial disputes which may arise in the future between his sons shall be settled in this manner.[2] An example occurring during his reign shows the details of the process. A controversy between the bishop and citizens of Verona, relative to the building of certain walls, was referred to the decision of the cross. Two young ecclesiastics, selected as champions, stood before the sacred emblem from the commencement of mass; at the middle of the Passion, Aregaus, who represented the citizens, fell lifeless to the ground, while his antagonist, Pacificus, held out triumphantly to the end, and the bishop gained his cause, as ecclesiastics were wont to do.[3]

When a defeated pleader desired to discredit his own compurgators, he had the right to accuse them of perjury, and the question was then decided by this process.[4] In a similar spirit, witnesses too infirm to undergo the battle-trial, by which in the regular process of law they were bound to substantiate their testimony, were allowed, by a Capitulary of 816, to select the ordeal of the cross, with the further privilege, in cases of extreme debility, of substituting a relative or other champion, whose robustness promised an easier task for the Divine interference.[5]

A slight variation of this form of ordeal consisted in standing with the arms extended in the form of a cross, while certain portions of the service were recited. In this manner St. Lioba, Abbess of Bischoffsheim, triumphantly vindicated the purity of her flock, and traced out the offender, when

[1] Capit. Pippini ann. 752, § xvii.

[2] Chart. Division. cap. xiv. Capit. ann. 779, § x.; Capit. IV. ann. 803, §§ iii. vi.; in L. Longobard. Lib. II. Tit. xxviii. § 3; Tit. lv. § 25, etc.

[3] Ughelli Italia Sacra T. V. p. 610 (Ed. 1653).

[4] Capit. Car. Mag. incerti anni c. x. (Hartzheim. Concil. German. I. 426).

[5] Capit. Lud. Pii ann. 816, § 1 (Eccardi L. Francorum, pp. 183, 184).

the reputation of her convent was imperilled by the discovery of a new-born child drowned in a neighboring pond.[1]

The sensitive piety of Louis le Débonnaire was shocked at this use of the cross, as tending to bring the Christian symbol into contempt, and in 816, soon after the death of Charlemagne, he prohibited its continuance, at the Council of Aix-la-Chapelle;[2] an order which was repeated by his son, the Emperor Lothair.[3] Baluze, however, considers, with apparent reason, that this command was respected only in the Rhenish provinces and in Italy, from the fact that the manuscripts of the Capitularies belonging to those regions omit the references to the ordeal of the cross, which are retained in the copies used in the other territories of the Frankish empire.[4] Louis himself would seem at length to have changed his opinion; for, in the final division of his succession between his sons, he repeats the direction of Charlemagne as regards

[1] Rudolph. Fuldens. Vitæ S. Liobæ cap. xv. (Du Cange, s. v. *Crucis Judicium*).

[2] Concil. Aquisgran. cap. xvii.

[3] L. Longobard. Lib. II. Tit. lv. § 32.

[4] Not. ad Libb. Capit. Lib. I. cap. 103. This derives additional probability from the text cited immediately above, relative to the substitution of this ordeal for the duel, which is given by Eckhardt from an apparently contemporary manuscript, and which, as we have seen, is attributed to Louis le Débonnaire in the very year of the Council of Aix-la-Chapelle. It is not a simple Capitulary, but an addition to the Salic Law, which invests it with much greater importance. Lindenbruck (Cod. Legum Antiq. p. 355) gives a different text, purporting likewise to be a supplement to the Law, made in 816, which prescribes the duel in doubtful cases between laymen, and orders the ordeal of the cross for ecclesiastical causes —"in Ecclesiasticis autem negotiis, crucis judicio rei veritas inquiratur"— and allows the same privilege to the "imbecillibus aut infirmis qui pugnare non valent." Baluze's collection contains nothing of the kind as enacted in 816, but under date of 819 there is a much longer supplement to the Salic law, in which cap. x. presents the same general regulations, almost verbatim, except that in ecclesiastical affairs the testimony of witnesses only is alluded to, and the *judicium crucis* is altogether omitted. The whole manifestly shows great confusion of legislation.

the settlement of disputed boundaries.[1] The procedure, however, appears to have soon lost its popularity, and indeed never to have obtained the wide and deeply-seated hold on the veneration of the people enjoyed by the other forms of ordeal, though there is extant a formula for confirming disputed titles to real estate decided in this manner.[2] We see little of it at later periods, except the trace it has left in the proverbial allusion to an *experimentum crucis*.

In India a cognate mode is adopted by the people of Ramgur to settle questions of disputed boundaries between villages. When agreement by argument or referees is found impossible, each community chooses a champion, and the two stand with one leg buried in the earth until weariness or the bites of insects cause one of them to yield, when the territory in litigation is adjudged to the village of the victor.[3]

CHAPTER VIII.

THE CORSNÆD.

The ordeal of consecrated bread or cheese (*judicium offæ*, *panis conjuratio*, *pabulum probationis*, the *corsnæd* of the Anglo-Saxons) was administered by presenting to the accused a piece of bread (generally of barley) or of cheese, about an ounce in weight,[4] over which prayers and adjurations had been pronounced. After appropriate religious ceremonies, including the communion, the morsel was eaten, the event being determined by the ability of the accused to swallow it. This depended of course on the imagination, and we can readily understand how, in those times of faith, the impressive ob-

[1] Chart. Divisionis ann. 837, cap. 10.

[2] Meyer, Recueil d'Anciens Textes, Paris, 1874, p. 12.

[3] Sir John Shore, in Asiatic Researches, IV. 362.

[4] Half an ounce, according to a formula in a MS. of the ninth century, printed by Dom Gerbert (Migne's Patrolog. CXXXVIII. 1142).

servances which accompanied the ordeal would affect the criminal, who, conscious of guilt, stood up at the altar, took the sacrament, and pledged his salvation on the truth of his oath. The mode by which a conviction was expected may be gathered from the forms of the exorcism employed, of which a number have been preserved.

"O Lord Jesus Christ, ... grant, we pray thee, by thy holy name, that he who is guilty of this crime in thought or in deed, when this creature of sanctified bread is presented to him for the proving of the truth, let his throat be narrowed, and in thy name let it be rejected rather than devoured. And let not the spirit of the Devil prevail in this to subvert the judgment by false appearances. But he who is guilty of this crime, let him, chiefly by virtue of the body and blood of our Lord which he has received in communion, when he takes the consecrated bread or cheese tremble, and grow pale in trembling, and shake in all his limbs; and let the innocent quietly and healthfully, with all ease, chew and swallow this morsel of bread or cheese, crossed in thy holy name, that all may know that thou art the just Judge," etc.[1]

And even more forcible in its devout impiety is the following:—

"O God Most High, who dwellest in Heaven, who through thy Trinity and Majesty hast thy just angels, send, O Lord, thy Angel Gabriel to stick in the throat of those who have committed this theft, that they may neither chew nor swallow this bread and cheese created by Thee. I invoke the patriarchs, Abraham, Isaac, and Jacob, with twelve thousand Angels and Archangels. I invoke the four evangelists, Matthew, Mark, Luke, and John. I invoke Moses and Aaron, who divided the sea. That they may bind to their throats the tongues of the men who have committed this theft, or consented thereto. If they taste this bread and cheese created by Thee, may they tremble like a trembling tree, and have no rest, nor keep the bread and cheese in their mouths; that all may know Thou art the Lord, and there is none other but Thee!"[2]

[1] Baluze II. 655.

[2] Muratori, Antiq. Ital. Dissert. 38.—For three other formulas see *Fasciculus Rerum Expetendarum et Fugiendarum*, Ed. 1690, II. 910.

As the efficiency of the ordeal depended upon the effect produced on the imagination of the patient clerical ingenuity exhausted itself in devising tremendous and awe-inspiring exorcisms. One like the following, for instance, could hardly fail to constrict the throat of the most hardened sinner:—

"I exorcise thee, accursed and most filthy dragon, basilisk, evil serpent, by the Word of truth, by almighty God, by the spotless Lamb begotten of the Highest, conceived of the Holy Ghost, born of the Virgin Mary, whose coming Gabriel announced, whom when John saw he cried aloud This is the Son of the living God, that thou may'st have no power over this bread or cheese, but that he who committed this theft may eat in trembling and vomit forth by Thy command, Holy Father and Lord, almighty and eternal God . . . . May he who has stolen these things or is an accomplice in this, may his throat and his tongue and his jaws be narrowed and constricted so that he cannot chew this bread or cheese, by the Father and the Son and the Holy Ghost, by the tremendous Day of Judgment, by the four Evangels, by the twelve Apostles, by the four and twenty elders who daily praise and worship Thee, by that Redeemer who deigned for our sins to stretch his hands upon the cross, that he who stole these things cannot chew this bread or cheese save with a swelled mouth and froth and tears, by the aid of our Lord Jesus Christ, to whom is honor and glory forever and forever."[1]

Yet Boccaccio's story of Calendrino, which turns upon the mixing of aloes with the bread administered in the *corsnæd*, perhaps affords a more rationalistic explanation of the expected miracle.[2]

A striking illustration of the superstitions connected with this usage is found in the story related by most of the English chroniclers concerning the death of Godwin, Duke of Kent, father of King Harold, and in his day the king-maker of England. As he was dining with his royal son-in-law, Edward the Confessor, some trivial circumstance caused the king to repeat an old accusation that his brother Alfred had met his

[1] Martene de Antiq. Eccles. Ritibus Lib. III. c. vii. Ordo 15.

[2] Decam. Giorn. VIII. Nov. 6.

death at Godwin's hands. The old but fiery duke, seizing a piece of bread, exclaimed: "May God cause this morsel to choke me if I am guilty in thought or in deed of this crime!" Then the king took the bread and blessed it, and Godwin, putting it in his mouth, was suffocated by it, and fell dead.[1] A poetical life of Edward the Confessor, written in the thirteenth century, gives a graphic picture of the death of the duke and the vengeful triumph of the king:—

"L'aleine e parole pert
Par le morsel ki ferm s'ahert.
Morz est li senglant felun;
Mut out force la benaicun,
Ke duna a mors vertu,
Par unc la mort provée fu.
'Atant' se escrie li rois,
'Treiez hors ceu chen punois.'"[2]

This form of ordeal never obtained the extended influence which characterized some of the other modes, and it seems to have been chiefly confined to the populations allied to the Saxon race. In England, before the Conquest, it was enjoined on the lower orders of the clergy who were unable to

[1] This account, with unimportant variations, is given by Roger of Wendover, ann. 1054, Matthew of Westminster, ann. 1054, the Chronicles of Croyland, ann. 1053, Henry of Huntington, ann. 1053, and William of Malmesbury, Lib. II. cap. 13, which shows that the legend was widely spread and generally believed, although the Anglo-Saxon Chronicle, ann. 1052, and Roger de Hoveden, ann. 1053, in mentioning Godwin's death, make no allusion to its being caused in this manner. A similar reticence is observable in an anonymous Life of Edward (Harleian MSS. 526, p. 408 of the collection in M. R. Series), and although this is perhaps the best authority we have for the events of his reign, still the author's partiality for the family of Godwin renders him not altogether beyond suspicion.

No great effort of scepticism is requisite to suggest that Edward, tired of the tutelage in which he was held, may have made way with Godwin by poison, and then circulated among a credulous generation the story related by the annalists.

[2] Lives of Edward the Confessor, p. 119 (M. R. Series).

procure conjurators,[1] and it may be considered as a plebeian mode of trial, rarely rising into historical importance. Its vitality, however, is demonstrated by the fact that Lindenbruck, writing in 1613, states that it was then still in frequent use.[2]

Aimoin relates a story which, though in no sense judicial, presents us with a development of the same superstition. A certain renowned knight named Arnustus unjustly occupied lands belonging to the Benedictine Abbey of Fleury. Dining at the usurped property one day, and boasting of his contempt for the complaints of the holy monks, he took a pear and exclaimed—"I call this pear to witness that before the year is out I will give them ample cause for grumbling." Choking with the first morsel, he was carried speechless to bed, and miserably perished unhouselled, a warning to evil-doers not to tempt too far the patience of St. Benedict.[3] Stories such as this are by no means uncommon, and are not without interest as a portion of the armory by which the clergy defended themselves against their unquiet neighbors. Of kindred nature is an occurrence related about the year 1090, when Duke Henry of Limburg was involved in a quarrel with Engilbert, Archbishop of Trèves, and treated with contempt the excommunication and anathema inflicted upon him. Joking upon the subject with his followers one day at dinner, he tossed a fragment of food to his dog, remarking that if the animal ate it, they need not feel apprehensive of the episcopal curse. The dog refused the tempting morsel, though he manifested his hunger by eagerly devouring food given him by another hand, and the duke, by the advice of his counsellors, lost no time in reconciling himself with his ghostly adversary. This is the more remarkable, as Engilbert himself was under excommunication by Gregory VII.,

[1] Dooms of Ethelred, IX. § 22; Cnut. Eccles. Tit. v.

[2] Alium examinis modum, nostro etiamnunc sæculo, sæpe malo modo usitatum.—Cod. Legum Antiq. p. 1418.

[3] De Mirac. S. Benedicti. Lib. I. c. v.

being a stanch imperialist, who had received his see from Henry IV., and his pallium from the antipope Guiberto.[1]

In India, this ordeal is performed with a kind of rice called *sathee*, prepared with various incantations. The person on trial eats it, with his face to the East, and then spits upon a peepul leaf. "If the saliva is mixed with blood, or the corners of his mouth swell, or he trembles, he is declared to be a liar."[2] A slightly different form is described for cases in which several persons are suspected of theft. The consecrated rice is administered to them all, is chewed lightly, and then spit out upon a peepul leaf. If any one ejects it either dry or tinged with blood, he is adjudged guilty.[3]

Based on the same theory is a ceremony performed by the pre-Aryan hill-tribes of Rajmahal, when swearing judges into office preparatory to the trial of a case. In this a pinch of salt is placed upon a *tulwar* or scimitar, and held over the mouth of the judge, to whom is addressed the adjuration, "If thou decidest contrary to thy judgment and falsely, may this salt be thy death!" The judge repeats the formula, and the salt is washed with water into his mouth.[4]

CHAPTER IX.

THE EUCHARIST AS AN ORDEAL.

From ancient times in India there has been in common use an ordeal known as *cosha*, consisting of water in which an idol has been washed. The priest celebrates solemn rites "to some tremendous deity," such as Durga or the Adityas, whose image is then bathed in water. Three handfuls of this water are then drunk by the accused, and if within fourteen days he

[1] Gesta Treverorum, continuat. I. (Migne's Patrol. CLIV. 1205-6).

[2] Ayeen Akbery, II. 498.

[3] Ali Ibrahim Khan (Asiatic Researches, I. 391–2).

[4] Lieut. Shaw in As. Researches, IV. 80.

is not visited with some dreadful calamity from the act of the deity or of the king, "he must indubitably be acquitted."[1]

In adapting the ordeal system to Christianity the natural substitute for this pagan ceremony was the administration of the Eucharist. This, indeed, formed a portion of the preparatory rites in all the judgments of God, the Host being given with the awful adjuration, "May this body and blood of our Lord Jesus Christ be a judgment to thee this day!" The apostle had said that "he that eateth and drinketh unworthily eateth and drinketh damnation to himself" (I. *Corinth.* xi. 28, 29), and the pious veneration of the age accepted the admonition literally. Mediæval literature is full of legends showing the miraculous power of the Eucharist in bringing sinners to repentance and exposure, even without any special invocation; and the absolute belief in this fetishism, even by the irreligious, is fairly illustrated by the case of a dissolute priest of Zurich, in the fourteenth century. An habitual drunkard, gambler, and fornicator, he yet celebrated mass daily with exemplary regularity. On being warned of the dangers to which he was thus exposing himself in partaking of the Eucharist, he at length confessed that he never consecrated the host, but that he carried about him a small round piece of wood, resembling the holy wafer, which he exhibited to the people and passed it off for the body of Christ. The honest chronicler fairly explodes with indignation in relating the subterfuge, and assures us that while the priest succeeded in escaping one danger he fell into a much greater, as he was the cause of leading his flock into the unpardonable sin of idolatry. Apparently his parishioners thought so too, for though they had patiently endured the scandals of his daily life, as soon as this trick became known they drove him away unceremoniously.[2] What this pastor, but for his ingenious device, might have reasonably dreaded

[1] Institutes of Vishnu, XIV.—Yajnavalkya, II. 112–13.

[2] Vitodurani Chron. ann. 1336.

is to be learned from the story of a volunteer miracle vouchsafed to an unchaste priest at Lindisfarne, who being suddenly summoned to celebrate mass without having had time to purify himself, when he came to partake of the sacramental cup, saw the wine change to an exceeding blackness. After some hesitation he took it, and found it bitter to the last degree. Hurrying to his bishop, he confessed his sin, underwent penance, and reformed his life.[1] Even more edifying was a case related as happening in France about the year 1200. A priest yielded to the temptation of the flesh immediately before celebrating mass on Christmas eve, when, after consecrating the body and blood, and before he could touch them with his polluted lips, a white dove appeared which drank the wine and carried off the wafer. It happened that he could find no one to replace him during the ceremonies of the festival, and, though appalled by the miracle, he could not refuse to perform his functions without exposure, so that a second and a third time he went through the canon with the same result. Finally he applied to an abbot, and confessed his sin with due contrition. The abbot postponed inflicting penance until the priest should officiate again, when the dove reappeared, bearing in its beak the three wafers, and returning to the chalice all the wine it had taken. Filled with rejoicing at this evidence that his contrition was accepted, the priest cheerfully undertook three years' pilgrimage in the Holy Land, prescribed for him by the abbot, and on his return entered a convent.[2]

A still more striking manifestation of the interposition of God by means of the Eucharist to vindicate innocence is to be found in the case of Erkenbald de Burban, a noble of Flanders, who was renowned for his inflexible administration of justice. While lying on his death-bed, his favorite nephew and heir endeavored to violate one of the maidens of the

[1] Roger of Wendover, ann. 1051.

[2] Cæsar. Heisterbacens. Dial. Mirac. Dist. II. c. v.

castle. Erkenbald ordered him to be hanged, but his followers were afraid to execute the sentence; so, when after an interval, the youth approached his uncle for a reconciliation, the latter put his arm affectionately round his neck, and drove a dagger up to the hilt in his throat. When Erkenbald made his final confession preparatory to the last sacrament, he refused to include this deed among his sins, claiming that it was an act of righteousness, and his bishop consequently refused to administer the Host. The dying man obdurately allowed him to depart; then ordering him recalled, asked him to see whether he had the wafer in his pyx. On the latter being opened it was found empty, and Erkenbald exhibited it to him in his mouth. The Eucharist which man had refused, God had ministered to the righteous judge.[1]

It is, therefore, easy to understand the superstition of the ages of faith which believed that, when the consecrated wafer was offered under appropriate adjurations, the guilty could not receive it; or that, if it were taken, immediate convulsions and speedy death, or some other miraculous manifestation would ensue, thus constituting its administration for such purposes a regular and recognized form of ordeal. This is well illustrated by a form of exorcism preserved by Mansi: "We humbly pray thy Infinite Majesty that this priest, if guilty of the accusation, shall not be able to receive this venerated body of thy Son, crucified for the salvation of all, and that what should be the remedy of all evil shall prove to him hurtful, full of grief and suffering, bearing with it all sorrow and bitterness."[2] What might be expected under such circumstances is elucidated by a case which occurred in the early part of the eleventh century, as reported by the contemporary Rodolphus Glaber, in which a monk, condemned to undergo the trial, boldly received the sacrament, when the Host, indignant at its lodgment in the body of so perjured a criminal, immediately slipped out at the navel, white and pure

[1] Ibid. Dist. IX. c. xxxviii. [2] Baluz. et Mansi Miscell. II. 575.

as before, to the immense consternation of the accused, who forthwith confessed his crime.[1]

The antiquity of this mode of trial is shown in its employment by Cautinus, Bishop of Auvergne, towards the close of the sixth century. A certain Count Eulalius was popularly accused of parricide, whereupon he was suspended from communion. On his complaining of thus being punished without a trial, the bishop administered the sacrament under the customary adjuration, and Eulalius, taking it without harm, was relieved from the imputation.[2] It was usually, however, a sacerdotal form of purgation, as is shown by the Anglo-Saxon laws,[3] and by the canons of the council of Worms in 868, embodied in the *Decretum* of Gratian.[4] Thus, in 941, Frederic, Archbishop of Mainz, publicly submitted to an ordeal of this kind, to clear himself of the suspicion of having taken part in an unsuccessful rebellion of Henry, Duke of Bavaria, against his brother, Otho the Great.[5] After the death of Henry, slander assailed the fame of his widow, Juthita, on account of an alleged intimacy between her and Abraham, Bishop of Freisingen. When she, too, died, the bishop performed her funeral rites, and, pausing in the mass, he addressed the congregation: "If she was guilty of that whereof she was accused, may the Omnipotent Father cause the body and blood of the Son to be my condemnation to just perdition, and perpetual salvation to her soul!"—after which he took the sacrament unharmed, and the people acknowledged the falsity of their belief.[6] In 1050, Subico, Bishop of Speyer, sought to clear himself of a similar accusation at the council of Mainz, in the same manner, when according to one version he succeeded, while another less friendly account assures us that

[1] Rod. Glabri Hist. Lib. v. cap. i.
[2] Greg. Turon. Hist. Lib. x. cap. 8.
[3] Dooms of Ethelred, x. § 20; Cnut. Eccles. Tit. v.
[4] C. 23, 26 Caus. ii. q. v.
[5] Reginonis Continuat. ann. 941.
[6] Dithmari Chron. Lib. ii.

his jaw became paralyzed in the very act, and remained so till the day of his death.[1]

Perhaps the most striking instance recorded of its administration was, however, in a secular matter, when in 869 it closed the unhappy controversy between King Lothair and his wives, to which reference has been already made. To reconcile himself to the Church, Lothair took a solemn oath before Adrian II. that he had obeyed the ecclesiastical mandates in maintaining a complete separation from his pseudo-wife Waldrada, after which the pontiff admitted him to communion, under an adjuration that it should prove the test of his truthfulness. Lothair did not shrink from the ordeal, nor did his nobles, to whom it was given on their declaring that they had not abetted the designs of the concubine; but leaving Rome immediately afterwards, the royal *cortége* was stopped at Piacenza by a sudden epidemic which broke out among the courtiers, and there Lothair died, August 8th, with nearly all of his followers—an awful example held out by the worthy chroniclers as a warning to future generations.[2]

In this degradation of the Host to the level of daily life there was a profanity repugnant to a reverential mind, and we are therefore not surprised to find King Robert the Pious, in the early part of the eleventh century, raising his voice against its judicial use, and threatening to degrade the Archbishop of Sens for employing it in this manner, especially as his biographer informs us that the custom was daily growing in favor.[3] Robert's example was soon afterwards imitated by Alexander II., whose pontificate lasted from 1061 to 1073.[4] The next pope, however, the impetuous Hildebrand, made use of it on a memorable occasion. When, in 1077, the Emperor Henry IV. had endured the depths of humiliation before the castle

[1] Hist. Archiep. Bremens. ann. 1051.—Lambert. Hersfeld. ann. 1050.—Hartzheim. Concil. German. III. 112.

[2] Regino ann. 869.—Annal. Bertiniani.

[3] Helgaldi Epitome Vitæ Roberti Regis.

[4] Duclos, Mémoire sur les Épreuves.

gate of Canossa, and had at length purchased peace by submitting to the exactions demanded of him, the excommunication under which he had lain was removed in the chapel. Then Gregory, referring to the crimes imputed to himself by the emperor's partisans, said that he could easily refute them by abundant witnesses; "but lest I should seem to rely rather on human than on divine testimony, and that I may remove from the minds of all, by immediate satisfaction, every scruple, behold this body of our Lord which I am about to take. Let it be to me this day a test of my innocence, and may the Omnipotent God this day by his judgment absolve me of the accusations if I am innocent, or let me perish by sudden death if guilty!" Swallowing the wafer, he turned to the emperor, and demanded of him the same refutation of the charges urged against him by the German princes. Appalled by this unexpected trial, Henry in an agony of fear evaded it, and consulted hurriedly with his councillors how to escape the awful test, which he finally declined on the ground of the absence of both his friends and his enemies, without whose presence the result would establish nothing.[1] In estimating the mingled power of imagination and conscience which rendered the proposal insupportable to the emperor, we must allow for the influence which a man like Hildebrand with voice and eye can exert over those whom he wishes to impress. At an earlier stage of his career, in 1055, he improvised a very effective species of ordeal, when presiding as papal legate at the Council of Lyons, assembled for the repression of simony. A guilty bishop had bribed the opposing witnesses, and no testimony was obtainable for his conviction. Hildebrand addressed him: "The episcopal grace is a gift of the Holy Ghost. If, therefore, you are innocent, repeat, 'Glory to the Father, and to the Son, and to the Holy Ghost!'" The bishop boldly commenced, "Glory to the Father, and to the Son, and to—"

[1] Lambert. Hersfeld. ann. 1077.

here his voice failed him, he was unable to finish the sentence; and, confessing the sin, he was deposed.[1]

Henry's prudence in declining the Eucharistic ordeal was proved by the fate of the unfortunate Imbrico, Bishop of Augsburg, who, in the same year, 1077, after swearing fealty to Rodolph of Suabia, abandoned him and joined the emperor. Soon after, while saying mass before Henry, to prove the force of his loyal convictions, he declared that the sacrament he was about to take should attest the righteousness of his master's cause; and the anti-imperialist chronicler duly records that a sudden disease overtook him, to be followed by speedy death.[2] In the case of William, Bishop of Utrecht, as related by Hugh of Flavigny, the Eucharist was less an ordeal than a punishment. He dared, at the Assembly of Utrecht, in 1076, to excommunicate Gregory, at the command of Henry IV.; but when, at the conclusion of the impious ceremony, he audaciously took the Host, it turned to fire within him, and, shrieking "I burn! I burn!" he fell down and miserably died.[3]

According to a Spanish theologian in the sixteenth century, when the Eucharist was administered as an ordeal it was to be taken without previous sacramental confession—presumably in order that the accused might not escape in consequence of absolution.[4] After the Reformation, the Protestants who denied the real presence naturally rejected this form of ordeal, but Del Rio, writing in 1599, compares them to frogs swelling themselves against an elephant; and Peter Kluntz, in 1677, assures us that it was still commonly used in his day.[5]

[1] This anecdote rests on good authority. Peter Damiani states that he had it from Hildebrand himself (Opusc. XIX. cap. vi.), and Calixtus II. was in the habit of relating it (Pauli Bernried. Vit. Greg. VII. No. 11).

[2] Bernald. Constant. Chron. ann. 1077.

[3] Hugon. Flaviniac. Chron. Lib. II. ann. 1080.—Lambert. Hersfeld. ann. 1076.

[4] Ciruelo, Reprovacion de las Supersticiones, P. II. cap. vii. Barcelona, 1628. The first edition appeared in 1539 at Salamanca.

[5] Del Rio Disquis. Magic. L. IV. c. iv. q. 3.—P. Kluntz Dissert. de Probat. per S. Eucharist. Ulmæ, 1677.

CHAPTER X.

THE ORDEAL OF THE LOT.

THE appeal to chance, as practised in India, bears several forms, substantially identical in principle. One mode consists in writing the words *dherem* (consciousness of innocence) and *adherem* (its opposite) on plates of silver and lead respectively, or on pieces of white and black linen, which are placed in a vessel that has never held water. The person whose cause is at stake inserts his hand and draws forth one of the pieces, when if it happens to be *dherem* it proves his truth.[1] Another method is to place in a vessel a silver image of Dharma, the genius of justice, and one in iron or clay of Adharma; or else a figure of Dharma is painted on white cloth and another on black cloth, and the two are rolled together in cow-dung and thrown into a jar, when the accused is acquitted or convicted according to his fortune in drawing Dharma.[2]

In adapting to Christian usage the ordeal of the lot, attempts were made to invest it with similar sacred symbolism, but it was not well adapted to display the awful solemnity which rendered the other forms so impressive. Notwithstanding the ample warrant for it in Scripture, and its approval by St. Augustin,[3] it was therefore in less favor with the Church, and it seems not to have retained among the people, after their conversion, the widespread popularity and confidence

[1] Ayeen Akbery, II. 498. This form of ordeal is allowed for all the four castes.

[2] Ali Ibrahim Khan (As. Researches I. 392).

[3] "Sors enim non aliquid mali est, sed res est in dubitatione humana divinam indicans voluntatem."—S. Augustini Enarrat. in Psal. XXX. Serm. ii. § 13.—Gratian. c. 1 Caus. XXVI. q. ii.—Gratian, however, gives an ample array of other authorities condemning it.

enjoyed by the other ordeals. Indeed, as a judicial process, it is only to be found prescribed in the earlier remains of the Barbarian laws and customs, and no trace of it is to be met with in the latter legislation of any race. Thus mention of it is made in the Ripuarian code,[1] and in some of the earlier Merovingian documents its use is prescribed in the same brief manner.[2] As late as the middle of the eighth century, Ecgberht, Archbishop of York, quotes from the canons of an Irish Council a direction for its employment in cases of sacrilegious theft, as a means of determining the punishment to be inflicted;[3] but not long after, the Council of Calchuth condemned the practice between litigants as a sacrilege and a remnant of paganism.[4] This was ineffectual, for about 850 Leo IV. describes it as in universal use in England, and forbids it as mere divination.[5]

No explanation is given of the details of the process by which this appeal to fortune was made, and I know of no contemporary applications by which its formula can be investigated; but in the primitive Frisian laws there is described an ordeal of the lot, which may reasonably be assumed to show us one of the methods in use. When a man was killed in a chance-medley and the murderer remained unknown, the friends had a right to accuse seven of the participants in the brawl. Each of these defendants had then to take the oath of denial with twelve conjurators, after which they were

[1] Ad ignem seu ad sortem se excusare studeat.—Tit. XXXI. § 5.

[2] Pact. Childeberti et Chlotarii, ann. 593, § 5: "Et si dubietas est, ad sortem ponatur." Also § 8: "Si litus de quo inculpatur ad sortem ambulaverit." As in § 4 of the same document the *æneum* or hot-water ordeal is provided for freemen, it is possible that the lot was reserved for slaves. This, however, is not observed in the Decret. Chlotarii, ann. 595, § 6, where the expression, "Si de suspicione inculpatur, ad sortem veniat," is general in its application, without reservation as to station.

[3] Ecgberti Excerpt. cap. lxxxiv. (Thorpe, II. 108).

[4] Conc. Calchuth. can. 19 (Spelman. Concil. Brit. I. 300).
Leon. PP. IV. Epist. VIII. c. 4 (Gratian, c. 7. Caus. XXVI. q. v.).

admitted to the ordeal. Two pieces of twig, precisely similar, were taken, one of which was marked with a cross; they were then wrapped up separately in white wool and laid on the altar; prayers were recited, invoking God to reveal the innocence or guilt of the party, and the priest, or a sinless youth, took up one of the bundles. If it contained the marked fragment, the defendants were absolved; if the unmarked one, the guilty man was among them. Each one then took a similar piece of stick and made a private mark upon it; these were rolled up as before, placed on the altar, taken up one by one, and unwrapped, each man claiming his own. The one whose piece was left to the last was pronounced guilty, and was obliged to pay the wer-gild of the murder.[1] Among the ancient Irish the lot or *crannchur* was employed by mingling white and black stones, when if the accused drew a black one he was adjudged guilty.[2]

The various modes of ecclesiastical divination, so frequently used in the Middle Ages to obtain an insight into the future, sometimes assumed the shape of an appeal to Heaven to decide questions of the present or of the past.[3] Thus, when three bishops, of Poitiers, Arras, and Autun, each claimed the holy relics of St. Liguaire, and human means were una-

[1] L. Frision. Tit. XIV. §§ 1, 2. This may not improbably be derived from the mode of divination practised among the ancient Germans, as described by Tacitus, De Moribus German. cap. x.

[2] Sullivan, *ap.* Pictet, Origines Indo-Européennes, III. 179.

[3] When used for purposes of divining into the future, these practices were forbidden. Thus, as early as 465, the Council of Vannes denounced those who "sub nomine fictæ religionis quas sanctorum sortes vocant divinationis scientiam profitentur, aut quarumcumque scripturarum inspectione futura promittant," and all ecclesiastics privy to such proceedings were to be expelled from the church (Concil. Venet. can. xvi.). This canon is repeated in the Council of Agde in 506, where the practice is denounced as one "quod maxime fidem catholicæ religionis infestat" (Conc. Agathens. can. xlii.); and a penitential of about the year 800 prescribes three years' penitence for such acts.—Ghaerbaldi Judicia Sacerdotalia c. 29 (Martene Ampl. Coll. VII. 33).

vailing to reconcile their pretensions, the decision of the Supreme Power was resorted to, by placing under the altar-cloth three slips with their respective names inscribed, and after a becoming amount of prayer, on withdrawing one of them, the see of Poitiers was enriched with the precious remains by Divine favor.[1]

That such appeals to chance were regarded by the Church with disfavor is shown by Gratian, who argues that the Hebrew examples were not precedents to be observed under the New Law.[2] Yet the second council of Barcelona in 599 had decreed that when an episcopal vacancy was to be filled two or three candidates should be chosen by the clergy and people, and from among these the metropolitan and his suffragans should select one by lot, after due fasting and prayer.[3]

One of the most interesting applications of the lot on record was that by which the founders of the Bohemian Brethren determined upon the future existence of the sect. At an assembly of deputies held at Lhotka, in 1467, the lot was resorted to to ascertain whether it was the will of God that they should separate themselves from the Roman presbyterate and seek consecration from the Waldenses, when the response was in the affirmative. Then nine men were chosen, from among whom three or two, or one, or none should be drawn as candidates for the episcopate. Twelve cards were taken, three inscribed "is" and nine "is not," and nine of them were distributed among the men selected. Three were found to be drawn; one of them was sent to an Austrian community of Waldenses for episcopal consecration, and the "Unitas Fratrum" was then organized.[4] This same pious dependence on the will of God is still preserved by the Mennonites in the choice of pastors. As described in the journals of 1884 an election of this kind in Lancaster County, Pennsylvania,

[1] Baldric. Lib. I. Chron. Camerac. cap. 21 (Du Cange, s. v. *Sors*).

[2] Decret. Caus. XXVI. q. ii.

[3] Concil. Barcinon. II. ann. 599 c. 3.

[4] Goll, Quellen und Untersuchungen, II. 99–105.

where there were twenty candidates, was conducted by three bishops. After divine service twenty books with clasps were taken in one of which was inserted a slip of paper inscribed *Ein Diener des Wort;* the books were placed in a row on a table and each applicant selected one. Bishop Shenk proceeded to open the books, and in the eleventh, held by Menno Zimmerman, the paper was found, entitling him to the position.

Closely related to the lot are the appeals to chance, to settle doubtful questions or ascertain guilt. Such was that made by the pious monks of Abingdon, about the middle of the tenth century, to determine their right to the meadows of Beri against the claims of some inhabitants of Oxfordshire. For three days, with fasting and prayer, they implored the Divine Omnipotence to make manifest their right; and then, by mutual assent, they floated on the Thames a round buckler, bearing a handful of wheat, in which was stuck a lighted taper. The sturdy Oxonians gaped at the spectacle from the distant bank, while a deputation of the more prudent monks followed close upon the floating beacon. Down the river it sailed, veering from bank to bank, and pointing out, as with a finger, the various possessions of the Abbey, till at last, on reaching the disputed lands, it miraculously left the current of the stream, and forced itself into a narrow and shallow channel, which in high water made an arm of the river around the meadows in question. At this unanswerable decision, the people with one accord shouted "Jus Abbendoniæ, jus Abbendoniæ!" and so powerful was the impression produced, that the worthy chronicler assures us that thenceforth neither king, nor duke, nor prince dared to lay claim to the lands of Beri, showing conclusively the wisdom of the abbot who preferred thus to rely upon his right rather than on mouldy charters or dilatory pleadings.[1]

A more prosaic form of the ordeal of chance is the trial by

[1] Hist. Monast. de Abingdon. Lib. I. (M. R. Series I. 89).

Bible and key which is of old Teutonic origin.[1] It is still in common use in England, where it may even yet "be met with in many an out-of-the-way-farm-house." In cases of theft a key is secured at Psalm 50, 18: "When thou sawest a thief, then thou consentedst with him, and hast been partaker with adulterers;"[2] and the mode in which it is expected to reveal guilt is manifested in a case recorded in the London *Times* as occurring at Southampton in 1867, where a sailor boy on board a collier was brought before court on a charge of theft, the only evidence against him being that afforded by securing a key in a Bible opposite the first chapter of Ruth. The Bible was then swung round while the names of several suspected persons were repeated, and on the mention of the prisoner's name the book fell on the floor. A somewhat different method is recounted in a case reported by the journals in 1879, where a woman in Ludlow, who had lost a sheet, perambulated the streets of the town with a Bible and key, and brought a prosecution against a person whose guilt she had thus discovered. It was explained in court that the key was placed at Ruth 1. 16, the investigator holding his fingers crossed, and when the thief was named the key would spontaneously move. In this case the prosecutrix declared that when she came to the defendant's house "the Bible turned completely round and fell out of her hands." A variant of this, described in two MSS. of the twelfth century, consisted in placing a piece of wood over the verse of the Psalm, "Thou art just, O Lord, and thy judgment is true;" the book was then securely bound so that the head of the wood protruded, and it was suspended, while a priest uttered an adjuration and the accused was questioned, the result being apparently determined by the motion or rest of the book. Still another form consisted of suspending a small loaf of bread which had been placed behind the altar during mass and at its conclusion blessed and marked

[1] Grimm's Teutonic Mythology, Stallybrass's Translation, p. 1109.

[2] E. B. Tylor on Ordeals and Oaths (Macmillan's Mag. July, 1876).

with a cross by the priest. At the trial he uttered a conjuration, when if the bread turned the accused was held guilty.[1]

Closely akin to the Bible and key is the sieve-driving or sieve-turning by which criminals were detected by the tilting or falling of a sieve when, in repeating the names of those suspected, that of the culprit was mentioned. The sieve required to be an heirloom in the family; it was balanced on the point of a pair of scissors, or was laid upon a pair of tongs, or the point of a pair of scissors was driven into the rim and it was suspended by the ring to the middle finger of the right hand. This was of ancient origin and was extensively practised in France and Germany even in the sixteenth and seventeenth centuries.[2] The existence of the same belief in England is shown in 1554, when William Haselwood, on being cited before the ecclesiastical court of the diocese of London, said that having lost his purse "remembering that he being a chylde dyd hear his mother declare that when any man had lost anything, then they wolde use a syve and a payre of sheers to bring to knowledge who hadd the thing lost; and so he did take a seve and a payre of sheeres and hanged the seve by the pointe of the sheeres and sayd these words: By Peter and Paule he hath yt, namying the party whom he in that behalf suspected."[3] Evidently at this time the Church regarded the process as sorcery.

[1] Patetta, Le Ordalie, p. 216.

[2] Grimm's Teutonic Mythology, pp. 1108–9. Grimm quotes Theocritus and Lucian to show that similar forms of divination with a sieve were familiar in classical antiquity.

[3] Inderwick, Side-lights on the Stuarts, p. 152.

CHAPTER XI.

BIER-RIGHT.

THE belief that at the approach of the murderer the corpse of the slain would bleed or give some other sign has, under the names of *jus feretri*, *jus cruentationis*, *bahr-recht*, and "bier-right," been a resource eagerly seized by puzzled jurists. Its source is not easily traced. There is no evidence of its existence among the Eastern Aryans, nor is it alluded to in any of the primitive "Leges Barbarorum," though Russian legends render probable that it was current among the Slavs at an early day.[1] Enthusiastic explorers into antiquity quote Aristotle for it,[2] while others find in

[1] Patetta, Le Ordalie, p. 158.

[2] Carena, Tractatus de Officio Sanctiss. Inquisit. P. II. Tit. xii. § xxii. In Carena's first edition (Cremona, 1636) there is no allusion to the subject. His attention apparently was attracted to it by a case occurring at Cremona in 1636, where he was acting as criminal judge. In this, Gonsalvo de Cremona, the clerical governor of Cremona, applied to the Council of Milan in February for instructions and received an unsatisfactory reply. He returned to the charge in June and was effectually snubbed by the following:—

"Philippus IV. Hispaniarum Rex et Mediolani Dux.

"Dilectiss. Noster: satis fuit responsum litteris quas die 28 Febr. proxime præteriti scripsistis ad magnificum Senatus nostri præsidem de nece Juliæ Bellisellæ et Jo. Baptisti Vicecomitis, cujus ex vulneribus sanguis exivit in conspectu Vespasiani Schitii, non autem Gasparis Picenardi, pariter suspectorum eius facinoris. Igitur novissimis litteris quibus petiistis vobis dici quid de ea re sentiamus nihil est quod præterea respondeamus nisi ut meliora quæratis indicia et juxta ea procedatis ad expeditionem causæ, referendo referenda.

"Mediolani 3 Julii, 1636."

Lucretius evidence that it was shared by cultured Romans.[1] Possibly its origin may be derived from a Jewish custom under which pardon was asked of a corpse for any offences committed against the living man, the offender laying hold of the great toe of the body as prepared for sepulture, and it is said to be not uncommon, where the injury has been grievous, for the latter to respond to the touch by a copious nasal hemorrhage.[2]

The earliest allusion I have met with to this belief occurs in 1189, and shows that already it was rooted in popular credulity. It is the well-known story that when Richard Cœur de Lion hastened to the funeral of his father, Henry II., and met the procession at Fontevraud, the blood poured from the nostrils of the dead king, whose end he had hastened by his rebellion and disobedience.[3] Although it never seems to have formed part of English jurisprudence, its vitality in the popular mind is shown in Shakespeare's Richard III., where Gloster interrupts the obsequies of Henry VI. and Lady Anne exclaims:—

> "O gentlemen, see, see! dead Henry's wounds
> Open their congealed mouths and bleed afresh!"

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[1] Marsilii Ficini de Immortal. Animæ Lib. XVI. c. 5.—Del Rio, Magicarum Disquisit. Lib. I. cap. iii. Q. 4, ¶ 6.—C. C. Oelsner de Jure Feretri cap. I. § 6 (Jenæ, 1711).

The passage relied on has usually a much less decent significance ascribed to it—

> "Idque petit corpus mens, unde 'st saucia amore:
> Namque omnes plerumque cadunt in volnus et illam
> Emicat in partem sanguis unde icimur ictu,
> Et si cominus est hostem ruber occupat humor."
>
> De Rer. Nat. IV. 1041–44.

[2] Gamal. ben Pedazhur's Book of Jewish Ceremonies, London, 1738, p. 11.

[3] Roger de Hoveden, ann. 1186; Roger of Wendover; Benedicti Abbatis Gesta Henricii II. ann. 1189.

And in the ballad of "Earl Richard"—

"Put na the wite on me, she said,
It was my may Catherine.
Then they hae cut baith fern and thorn,
To burn that maiden in.

"It wadna take upon her cheik,
Nor yet upon her chin,
Nor yet upon her yellow hair
To cleanse that deadly sin.

"The maiden touched that clay-cauld corpse,
A drap it never bled.
The ladye laid her hand on him,
And soon the ground was red."[1]

This indicates that the belief was equally prevalent in Scotland. Indeed King James VI. gave it the stamp of his royal authority,[2] and cases on record there show that it was occasionally received as judicial evidence, and even sometimes prescribed as an ordeal for detection. Thus in 1611, doubts arising as to the mode by which a person had met his death, the vicinage was summoned, as we are told according to custom, to touch the body which had been exhumed for the purpose. The murderer, whose rank relieved him of suspicion, kept away, but his little daughter, attracted by curiosity, approached the corpse, when it began to bleed and the crime was proved.[3] One of the most noted cases in which crime was detected in this manner was that of Philip Standsfield, tried in 1688 for the murder of his father, Sir James Standsfield of New Milne. In this the indictment sets forth that after the body had been found in a pond and an autopsy had been performed by a surgeon, "James Row, merchant, having lifted the left side of Sir James, his head and shoulder, and the said Philip the right side, his father's body, though care-

[1] Scott's Minstrelsy of the Scottish Border.

[2] Nam ut in homicidio occulto sanguis e cadavere, tangente homicida, erumpit, quasi cœlitus poscens ultionem.—Demonologiæ Lib. III. c. vi.

[3] Scott's notes to the ballad of Earl Richard.

fully cleaned, as said is, did (according to God's usual mode of discovering murders), blood afresh upon him and defiled all his hands, which struck him with such a terror that he immediately let his father's head and body fall with violence and fled from the body and in consternation and confusion cryed Lord have mercy upon me! and bowed himself down over a seat in the church (where the corp were inspected), wiping his father's innocent blood off his own murdering hands upon his cloaths." When such was the spirit of the prosecution it need not surprise us that though the defence showed that in the autopsy an incision had been made in the neck, where there was a large accumulation of extravasated blood, and though high authorities were quoted to prove that such bleeding was not evidence sufficient even to justify torture, Philip Standsfield was condemned and executed in spite of the insufficiency of circumstantial evidence.[1] A similar incident is recorded in the indictment of Christian Wilson, tried for witchcraft at Edinburgh in 1661.[2] These cases are typical, inasmuch as they illustrate the two forms, the existence of which differentiates this from other ordeals. Sometimes, as in others, suspects were brought, under judicial order, to view or touch the body. Frequently, however, the occurrence is spontaneous, and serves to excite or direct suspicion where none existed before.

The belief extended throughout all the nationalities of Europe. Although there is no reference to it in the German municipal codes of the thirteenth century, there is ample store of cases both of its spontaneous occurrence and of its judicial employment. In 1261, at Forchheim, a manifestation of this kind brought home to the Jews the lingering death of a young girl slain by them according to their hellish custom, and the guilty were promptly broken on the wheel.[3] More serious

[1] Cobbett's State Trials, XI. 1371.

[2] Spottiswoode Miscellanies, II. 69.

[3] Alphonsi de Spina Fortalicium Fidei Lib. III. consid. vii.

was an affair at Ueberlingen in 1331. The body of a child was found in a pond and from the character of the wounds it was recognized that Jewish fanaticism had caused the murder. The corpse was therefore carried in front of the houses of the principal Jews and when it began to bleed the evidence was deemed sufficient. The burgomaster endeavored to calm the populace, but his efforts were ascribed to Hebrew gold, and condign punishment was resolved upon. All the Jews of the town were skilfully decoyed into a large stone house and when they had been securely locked in the upper stories it was set on fire. Those that succeeded in throwing themselves from the roof were dispatched by the mob, and the rest, to the number of three hundred, were consumed by the avenging flames. Though sundry miracles ratified the justice of the act, yet the godless Emperor, Louis of Bavaria, punished the pious townsfolk by dismantling their walls and levying a heavy fine upon them.[1] The judicial employment of the ordeal is seen in a case in 1324, when Reinward, a canon of Minden, was murdered by a drunken soldier and the crime was proved by a trial of this kind.[2] More satisfactory, as showing how through the influence of imagination the ordeal sometimes resulted in substantial justice, was a case in Lucerne in 1503, when Hans Speiss of Etiswiler murdered his wife. She was duly buried, but suspicion arose, and after three weeks the body was exhumed and he was brought before it. As he approached, it flushed with color and immediately began to bleed. He had hitherto defiantly asserted his innocence, but at this sight he fell on his knees, confessed the crime, and begged for mercy. He was broken on the wheel and died most penitently.[3] Numerous cases are on record of its use throughout Germany in the seventeenth century, of which it will suffice to refer to one in which the corpse manifested a discrimination greatly

[1] Vitodurani Chron. ann. 1331.

[2] Swartii Chron. Ottbergensis § xlvii. (Paullini Antiq. Germ. Syntagma).

[3] Val. Anshelm, Berner-Chronik, ann. 1503 (Bern, 1886, II. 393).

impressing the authorities. It had been dead for thirty-six hours and refused to bleed on the approach of two persons suspected. Then three others were brought, one of whom, George, had planned the murder and been present, but had not taken personal part in it: for him the corpse bled at the mouth. Then came Lorenz, who had held the victim when the blow was struck: for him the mouth frothed and the wound bled. Finally Claus, who had inflicted the blow, came, and for him the blood gushed forth from the wound.[1]

The extent to which popular credulity was prepared to accept this miraculous manifestation is shown in a story which obtained wide currency. An Austrian noble journeying to Vienna passed through a wood in which his dogs scratched up some bones. Their whiteness struck his fancy; he carried them to the city and sent them to a cutler to be worked up into some ornament, when as soon as they were brought into the presence of the artificer they became covered with blood. The noble reported the fact to the magistrates, the cutler was arrested and confessed that twenty years before he had slain a comrade and buried the body where the bones were found.[2] We may trace a more poetic form of this sympathy in the legend which relates the welcome given by the bones of Abelard to Heloise when, twenty years after his death, her body was consigned to his tomb.

In Denmark, though this form of trial finds no place in the codes of law, we are told that it was generally used during the seventeenth century in all appropriate cases.[3] In Holstein

[1] Oelsner de Jure Feretri c. iii. § 8. This little thesis was written in 1680. It seems to have met with approval, for it was reprinted in 1711 and 1735.

[2] Oelsner *op. cit.* cap. iii. § 7. A variant of this story is told by Scott in his notes to the "Minstrelsy of the Scottish Border." In this the bone chances to be fished up from a river, where it had lain for fifty years, and the murderer, then an old man, happens to touch it, when it streams with blood. He confesses the crime and is duly condemned.

[3] Carena, *op. cit.* P. II. Tit. xii. § 22.

there was a custom known as *Scheingehen*, in which, when a murderer remained undiscovered, a hand was severed from the corpse with provident care and preserved as a touchstone for the future. A celebrated case is related in the books in which a dead body was found and buried, and the hand was hung up in the prison of Itzehoe. Ten years later a thief was arrested and brought there, when the hand immediately began to bleed freely, and the thief confessed the murder.[1]

Italy shared fully in the belief. The most distinguished exponent of the New Learning in the fifteenth century, Marsiglio Ficino, the Platonist, does not hesitate to adduce it as a fact well known to judges, in his argument to prove the immortality of the soul against the Averrhoism fashionable in his day.[2] Equally distinguished as a jurist was Hippolito de' Marsigli (died in 1528), who relates that in his youth he was governor of Alberga, near Genoa, when a murder occurred without affording evidence as to the perpetrator. By the advice of an old citizen he had the body brought before him and summoned all liable to suspicion to pass near it one by one. When the homicide approached, to the surprise of Marsigli, the wounds burst out afresh, but his incredulity was such that he did not consider this to warrant even an arrest until he had collected sufficient collateral evidence, when the culprit confessed without torture.[3] In Venice this ordeal was sometimes used and likewise in Piedmont, though in the latter region some magistrates regarded it as fallacious, for their experience showed that blood had not flowed in the presence of those

[1] Oelsner, cap. iii. § 6. Joh. Christ. Nehring de Indiciis, Jenæ, 1714, p. 19.—Königswarter (*op. cit.* p. 183) tells us that this custom was observed also in the Netherlands and throughout the North.

[2] Unde forte contingit ut occisi hominis vulnus etiam jacente cadavere, in eum qui vulneraverat, si modo ille comminus instet, vulnus ipsum inspiciens, sanguinem rursus ejiciat, quod quidem evenire nonnunquam Lucretius affirmavit et judices observarunt.—De Immortalitate Animæ Lib. XVI. c. 5.

[3] Marsil. Pract. Criminal. (*ap.* Binsfeld, de Confess. Maleficar. pp. 111–12).

subsequently proved to be guilty.[1] In Corsica the belief, if not still existent, has been widely diffused until within a few years.[2]

France seems to have been even more addicted to this superstition. About 1580 President Bertrand d'Argentré, in his Commentaries on the Customs of Brittany, treats it as an indisputable fact and one affording good evidence.[3] In Picardy we are told it was constantly used by magistrates, it was approved by the courts in Bordeaux, and Chassanée, whose authority in Burgundy was great, argues that its occurrence justifies the torture of the accused without further videence.[4] Spain likewise was not exempt from it. A celebrated case is cited in the books as occurring in Aragon, where the accused was brought before the corpse of the victim in the public square and appealed to God to perform a miracle if he were guilty, whereupon the body raised its right arm, pointed with its fingers to the several wounds and then to the accused; this was regarded as sufficient proof, and under sentence of the Council of Aragon the culprit was executed. Another case which occurred at Ledesma, near Salamanca, shows the existence of the belief in Castile.[5]

English colonists brought the superstition across the Atlantic, where it has never been fairly eradicated from the popular mind. In January, 1680, in Accomac County, Virginia, a new-born illegitimate child of "Mary, daughter of Sarah, wife of Paul Carter" died and was buried. It was nearly six weeks before suspicion was aroused, when the coroner impannelled a jury of twelve matrons, whose verdict recorded that

[1] Carena, *loc. cit.*

[2] Patetta, Le Ordalie, p. 34.

[3] Cujus rei rationem petunt e causis naturalibus et reddere conatur Petrus Apponensis; quæ qualescunque tandem hæ sint, constat evenisse sæpe, et magnis autoribus tradita exempla.—B. d'Agentré Comment. in Consuet. Britann. p. 145 (Ed. Antverp. 1644).

[4] Carena, *loc. cit.*—Oelsner, *op. cit.* c. iv. § 2.

[5] Carena, *loc. cit.* A similar dramatic exhibition by a corpse is recorded in a case occurring in Germany in 1607.—Oelsner, c. iii. § 5.

Sarah Carter was brought to touch the corpse without result, but when Paul Carter touched it "immediately whilst he was stroaking ye childe ye black and settled places above ye body of ye childe grew fresh and red so that blud was ready to come through ye skin of ye childe." On the strength of this verdict an indictment was found against Paul Carter, but with what result the records do not show.[1] Nearly a century later, in 1767, the coroner's jury of Bergen County, N. J., was summoned to view the body of one Nicholas Tuers, whose death had led to suspicion of murder. Johannes Demarest, the coroner, attests that he had no belief in bier-right and paid no attention to the experiment, when one of the jury touched the body without result. At length a slave named Harry, who had been suspected without proof, was brought forward for the trial when he heard an exclamation "He is the man," and was told that the body had bled when touched by Harry. He then ordered the slave to place his hand on its face, when about a tablespoonful of blood flowed from each nostril, and Harry confessed the murder.[2] So recently as 1833 a man named Getter was hanged in Pennsylvania for the murder of his wife, and among the evidence which was allowed to go to the jury on the trial was that of a female witness, who swore "If my throat was to be cut I could tell, before God Almighty, that the deceased smiled when he (the murderer) touched her. I swore this before the justice, and also that she bled considerably. I was sent for to dress her and lay her out. He touched her twice. He made no hesitation about doing it. I also swore before the justice that it was observed by other people in the house."[3] This is perhaps the latest instance in which bier-right has figured in regular judicial proceedings, but the popular belief in it is by no means eradicated. In 1860 the

[1] I owe this account to the kindness of L. S. Joynes, M.D., of Richmond, who informs me that he found it while examining the Accomac County records.

[2] Annual Register for 1767, pp. 144–5.

[3] Dunglison's Human Physiology, 8th Edition, II. 657.

Philadelphia journals mention a case in which the relatives of a deceased person, suspecting foul play, vainly importuned the coroner, six weeks after the interment, to have the body exhumed in order that it might be touched by a person whom they regarded as concerned in his death. In 1868 at Verdiersville, Virginia, a suspected murderer was compelled to touch the body of a woman found murdered in a wood; and in 1869, at Lebanon, Illinois, the bodies of two murdered persons were exhumed and two hundred of the neighbors were marched past and made to touch them in the hope of identifying the criminals.[1]

In Germany, in the seventeenth century, there was a recognized formula for the administration of the ordeal. The corpse was exposed to the open air for some hours, with breast and stomach bare to insure the thorough coagulation of the blood. The person suspected was then brought forward and required to repeat certain adjurations read to him, and then he was made to touch with two fingers the mouth, the navel, and the wounds, if there were any. If the corpse manifested any signs of sensation, if there was frothing at the mouth, or bleeding from any orifices or wounds it was considered an evidence of guilt.[2] The trial was not a mere popular experiment, but was a judicial proceeding, under the order of a magistrate.

Although bier-right, in comparison with other ordeals, plays so inconspicuous a part in the history of jurisprudence, it is especially interesting in one respect. As a judicial expedient, it did not spring into notice until after the other vulgar ordeals had been discredited and banished from the courts. It escaped the censure of the Church and was a survival of the Judgment of God, reaching its fullest development in the seventeenth century. It thus became the subject of investigation and debate in an age of critical tendencies and comparative

[1] Phila. Bulletin, April 19, 1860.—N. Y. World, June 5, 1868.—Phila. North American, March 29, 1869.

[2] Oelsner, *op. cit.* cap. i. § 10; c. iii. § 8.

intelligence. Among those who had faith in it there was much fruitless speculation to account for the result, and there was by no means a consensus of opinion as to the causes at work. In 1487 the inquisitor Sprenger takes a materialistic view and uses it as the basis of an argument on the wonderful properties of inanimate matter. He explains that air is introduced into the wound when it is inflicted, and that it rushes out when agitated by the presence of the slayer, bringing blood with it, but he adds that others believe it to be the cry of blood from the earth against the murderer, as related of the first homicide, Cain.[1] About a century later Del Rio tells us that some looked upon it as a miracle, others as an accident, while he himself can see no better reason than the violent antipathy conceived by the slain for the slayer.[2] Carena holds it to be the mysterious Judgment of God, unless it happens to be the work of the demon, and in this uncertainty concludes that if there are no other proofs it only justifies further investigation and not torture.[3] Oelsner informs us that learned men disputed whether it was occasioned by antipathy or sympathy, by the remains of the soul in the body, by wandering spirits of the dead, or by the spirit of enmity, and he concludes that the causes are sometimes natural and sometimes supernatural.[4] It is significant that, among so many theories framed by believers in the fact, there were so few who assented to the direct interposition of God.

Among jurists there was lively debate as to the exact weight of the evidence when the experiment was successful. Criminal lawyers were naturally loath to admit that it was decisive, for the corollary followed that if no bleeding occurred the suspect must be innocent, which was contradicted by the numerous

[1] Malleus Maleficarum, Francof. 1580, pp. 21, 32.

[2] Magicarum Disquisit. Lib. I. cap. iii. Q. 4, ¶ 6.

[3] Tract. de Officio Sanctiss. Inquisit. P. II. Tit. xii. § 22.—"Sed utcunque sit certum est in judiciis passim fuisse practicatum indicium istud sanguinis emissi sufficere ad torturam si doctoribus nostris credendum est."

[4] De Jure Feretri, cap. ii.

cases in which an accused successfully passed through the ordeal and was subsequently proved to be guilty. This decisiveness was the essence of the older ordeals, and was wholly opposed to the current inquisitorial system in which certainty was aimed at by the habitual use of torture. Almost with unanimity, therefore, the legists held that it was only one of the indications pointing to guilt, and that its failure could not be alleged as a proof of innocence. They differed, however, as to the weight of the indication which it afforded. Authoritative names were cited in favor of the opinion that it sufficed by itself to justify the subjection of the accused to torture, as in a case at Marburg in 1608, where on this ground alone several suspects were tortured, when they confessed and were executed. Others took the position that it did not of itself warrant the use of torture, and that it required to be supported by other proof. Among these was the great criminal jurist Carpzov, who states that in cases submitted to him and his colleagues he had seen many in which no bleeding occurred when the murderers touched the corpse, while in others it did occur when innocents were exposed to the trial.[1] When the discussion had reached this stage the ordeal became a superfluity which was bound to disappear from the courts in spite of the persistence of popular credulity, and a school of jurists arose who denied that it deserved the name of evidence, and declared that it must be wholly disregarded. It was only a question of time when this opinion should triumph, and the first quarter of the eighteenth century probably witnessed the disappearance of this survival of mediævalism from recognized judicial procedure.[2]

[1] Oelsner, *op. cit.* c. iv. §§ 2, 3. Cf. Zangeri Tract. de Quæstionibus cap. ii. n. 160.—It is perhaps worthy of remark that the earlier jurists made no allusion to it. Angelus Aretinus, Albertus de Gandavo, and Bonifacius de Vitellinis, in discussing the proofs requisite to justify torture, do not mention it.

[2] As late as 1678, an anonymous *Praxis Criminalis*, printed at Altenburg, speaks of it as a recognized process, gives instructions as to the cautions

CHAPTER XII.

OATHS AS ORDEALS.

THE oath naturally formed an integral portion of the ordeal. Even as in the battle trial both parties, on entering the lists, were compelled to swear to the truth of their assertions, so in the other ordeals the accuser and accused took an oath immediately prior to the administration of the test.[1] Sometimes, however, the oath of the accused was regarded as a sufficient ordeal in itself. We have seen above how, among many and diverse races, disculpatory oaths are administered with ceremonies which render them practically ordeals in view of the popular belief that misfortune will follow perjury. The anthropomorphic mythology of Hellas presents this idea in its most concrete form by the most solemn oath of the gods, taken on the water of Styx brought in a vase for the purpose, perjury on which was followed by a year of stupor and nine years of segregation from all fellowship with the brother immortals.[2] We have also seen (pp. 29 sqq.) that in Christendom the Church set little store by simple oaths, but reckoned their obligation by the holiness of the material objects on which they were taken; and when these were relics of peculiar sanctity they were held to have the power of punishing the perjurer, thus rendering the oath administered upon them an absolute ordeal. This belief developed itself at an early

requisite, and says the record must be sent to the magistrate (Ib. c. i. § 11). —In 1714, Nehring (De Indiciis, Jenæ, 1714, pp. 42–3) still quotes authorities in favor of its justifying torture, and feels obliged to argue at some length to demonstrate its inadequacy.

[1] Martene de antiq. Ecclesiæ Ritibus, Lib. III. c. vii. Ordo 8, 16.

[2] Hesiodi Theogonia, v. 794–806.

period in the history of the Church. St. Augustin relates that at Milan a thief, who swore upon some holy relics with the intention of bearing false witness, was forced irresistibly to confess himself guilty of the offence which he designed to fasten upon another; and Augustin himself, when unable to decide between two of his ecclesiastics who accused each other of revolting crime, sent them both to the shrine of St. Felix of Nola, in the full expectation that the judgment of God would bring to light the truth as between them.[1] Gregory the Great shows the same belief when he alludes to a simple purgatorial oath taken by a bishop on the relics of St. Peter in terms which expressly convey the idea that the accused, if guilty, had exposed himself to no little danger, and that his performance of the ceremony unharmed had sufficiently proved his innocence. Gregory, moreover, in one of his Homilies, assumes that perjury committed on the relics of the saints is punished by demoniacal possession.[2]

This was not a belief likely to be allowed to die out for lack of nourishment. When, in the tenth century, Adaulfus, Bishop of Compostella, was accused of a nameless crime, and was sentenced by the hasty judgment of the king to be gored to death by a wild bull, he had taken the precaution, before appearing at the trial, to devoutly celebrate mass in his full pontificals. The bull, maddened with dogs and trumpets, rushed furiously at the holy man; then, suddenly pausing, advanced gently towards him and placed its horns in his hands, nor could any efforts of the assistants provoke it to attack him. The king and his courtiers, awed by this divine interposition in favor of innocence, threw themselves at the feet of the saint, who pardoned them and retired to the wildest region of the Astu-

[1] August. Epist. lxxviii. §§ 2, 3 (Ed. Benedict.).—"Ut quod homines invenire non possunt de quolibet eorum divino judicio propaletur."

[2] Decreti c. 6, Caus. II. q. v.—Gregor. PP. I. Homil XXXII. in Evangel. cap. 6.

Dr. Patetta (Ordalie, p. 15) informs us that in some parts of Piedmont it is still believed that a perjurer will die within the year.

rias, where he passed the rest of his days as an anchorite. He left his chasuble behind him, however, and this garment thenceforth possessed the miraculous power that, when worn by any one taking an oath, it could not be removed if he committed perjury.[1]

In other cases the shrines of saints convicted the perjurer by throwing him down in an epileptic fit, or by fixing him rigid and motionless at the moment of his invoking them to witness his false oath.[2] The monks of Abingdon boasted a black cross made from the nails of the crucifixion, said to have been given them by the Emperor Constantine, a false oath on which was sure to cost the malefactor his life; and the worthy chronicler assures us that the instances in which its miraculous power had been triumphantly exhibited were too numerous to be specified.[3] At the priory of Die, dependent on the great Benedictine abbey of Fleury, there was preserved an arm-bone of St. Maur, which was possessed of somewhat similar properties. On one occasion a steward of the priory named Joscelin was accused of embezzlement, and offered to rebut the evidence against him by an oath taken on the arm of St. Maur. Rejoiced at passing through the test triumphantly, he removed his hand from the relic, and stroking his long beard with it he exclaimed, "By this beard, the oath I swore was true!" when suddenly the beard came off in his hand, and his chin, thenceforth hairless, was the evidence alike of his guilt and his perjury, so that he and his descendants were at once proclaimed ineligible to the stewardship.[4] Less serious in its consequences was a false oath taken by a peasant on the altar of St. Martial of Limoges. The offender was deprived of speech, and could only bellow

[1] Munionis Histor. Compostellan. Lib. I. cap. 2, § 2.

[2] Gregor. Turon. De Gloria Martyrum cap. 58, 103.

[3] Sancta enim adeo est, ut nullus, juramento super eam præstito, impune et sine periculo vitæ suæ possit affirmare mendacium.—Hist. Monast. Abing. Lib. I. c. xii. (M. R. Series).

[4] Radulph. Tortarii Mirac. S. Benedicti cap. xxii. (Migne's Patrol. T. CLX. p. 1210).

like an ox until he had prayed over the tomb of the saint, and his throat had received the sign of the cross from a priest.[1] Even at the present day the jaw-bone of St. Patrick is preserved near Belfast, and is used extra-judicially as an ordeal, in the full conviction that the slightest variation from the truth will bring instantaneous punishment on the perjurer,[2] and in Sardinia a similar oath on relics is believed when false to flay the hand of the accused.[3] In the Middle Ages these dangerous relics were common, and however we may smile at the simplicity of the faith reposed in them, we may rest assured that on many occasions they were the means of eliciting confessions which could have been obtained by no devices of legal subtlety according to modern procedures.

Nor did it always require death to confer the sanctity requisite to perform these miracles, as was attested during the life of St. Bertrand of Comminges. A woman accused of adultery went to the saint and laying her hand on him swore to her innocence, when the hand immediately withered and remained a permanent witness of her guilt and her perjury.[4]

Even without any special sanctity in the administration of the oath, Heaven sometimes interposed to protect the rights of the Church. About the year 1200 Cæsarius of Königswinter, a knight, who had borrowed twenty marcs of his brother, Hirminold Dean of the Chapter of Bonn, denied the loan after his brother's death. As the money belonged to the Church, the chapter summoned the knight, and having no proof, were obliged to content themselves with his oath. Having accomplished his perjury, Cæsarius mounted his horse and returned homewards, but when he had accom-

[1] Gregor. Turon. de Glor. Confess. c. xxix.

[2] Chambers's Book of Days, I. 384.

[3] Patetta, Le Ordalie, p. 34. In Tonga and Samoa false oaths taken on certain sacred articles are likewise believed to be followed by speedy death (Ib. p. 63).

[4] Vit. S. Bertrandi Convenar. No. 26 (Martene Ampliss. Collect. VI. 1035).

plished the half of his journey his horse was suddenly fixed immovable to the earth, and he found himself deprived of the use of the tongue which he had thus abused. Recognizing the source of the trouble, he prayed to Abraham, promising to retrace his steps and confess his sin. He was immediately released, returned to Bonn, made restitution, and accepted penance. He subsequently entered the monastery of Heisterbach as a novice, and related the story of himself.[1]

CHAPTER XIII.

POISON ORDEALS.

The poison ordeal, which forms the basis of judicial proceedings among so many of the African tribes, seems not to have been brought into Europe by the Aryan invaders, although it was in use among their kindred who remained in the East. Possibly this may have arisen from the fact that in their migrations they could no longer obtain the substances which they had been accustomed to use, and before they had familiarized themselves with the resources of their new homes the custom may have fallen into desuetude amid the abundance of other methods. A lingering remnant of it may perhaps be detected in the trial of the priestess of the Gæum in Achaia, already alluded to, but substantially the poison ordeal may be regarded as obsolete in the West.

In the East, however, it has continued in use. The poison prescribed is that known as *sringa*, produced by a tree which grows in the Himalayas, and the judge invokes it—

"On account of thy venomous and dangerous nature thou art destruction to all living creatures; thou, O poison, knowest what mortals do not comprehend.

"This man being arraigned in a cause desires to be cleared

[1] Cæsar. Heisterbach. Dial. Mirac. Dist. IV. c. lviii.

from guilt. Therefore mayest thou deliver him lawfully from this perplexity."

Seven grains of the substance, mixed with clarified butter, are then administered; if no evil symptoms follow during the day, at evening the accused is dismissed as innocent.[1] A more recent authority describes a somewhat different form. A specified quantity of some deadly article, varying in amount with its activity, is mixed with thirty times its weight of *ghee*, or clarified butter. The patient takes this, standing with his face to the north, and if it produces no effect upon him while the bystanders can clap their hands five hundred times, he is pronounced innocent and antidotes are at once administered to him.[2] A slight variation of this is recorded by a writer of the last century. After appropriate religious ceremonies, seven barleycorns of the deadly root *vishanaga*, or of arsenic, are mingled with thirty-two times its bulk of *ghee*, and eaten by the accused from the hand of a Brahman. If it produces no effect, he is acquitted.[3] Much more humane was the custom described by Hiouen Thsang in the seventh century, when the experiment was performed vicariously on a bullock, even as a hen is used among the Niam-Niam of equatorial Africa. The animal was fed with poisoned food, and poison was likewise inserted in a wound made for the purpose in the right leg, while the fate of the accused was determined by the death or survival of the unlucky beast.[4]

Still another form in modern times seems to have been invented as a combination of the hot-water and poison ordeals. A *naga* or cobra is dropped into a deep earthen pot along with a coin or ring, which the person on trial must remove with his hand. If he is bitten, he is condemned; if he escapes scathless, he is acquitted.[5]

[1] Institutes of Vishnu XIII.—Yajnavalkya, II. 110–111. Yajnavalkya classes it among the ordeals reserved for the Sudra caste (Ib. II. 98).

[2] Ayeen Akbery, II. 497.

[3] Ali Ibrahim Khan (As. Researches, I. 391).

[4] Wheeler's India, III. 262.

[5] Ali Ibrahim Khan, *ubi sup.*

CHAPTER XIV.

IRREGULAR ORDEALS.

The devout dependence upon Heaven, exhibited in the ordeal, did not exhaust itself on the forms of trial described above, but was manifested in various other expedients, sometimes adopted as legal processes, and sometimes merely the outcome of individual credulous piety. While therefore they cannot be regarded as forming part of the recognized institutions of Europe, still they illustrate too clearly the tendency of thought and belief to be entirely passed over.

Among these may be classed a practice which was substantially an appeal to God to regulate the amount of punishment requisite for the expiation of a crime. One or more bands of iron were not infrequently fastened around the neck or arm of a murderer, who was banished until by pilgrimage and prayer his reconciliation and pardon should be manifested by the miraculous loosening of the fetter, showing that soul and body were both released from their bonds.[1] A case is related of a Pole thus wandering with a circlet tightly clasped to each arm. One fell before the intercession of St. Adalbert, the apostle of Prussia, but the other retained its hold until the sinner came to the shrine of St. Hidulf near Toul. There, joining in the worship of the holy monks, the remaining band flew off with such force that it bounded against the opposite wall, while the pardoned criminal fell fainting to the ground, the blood pour-

[1] Fratricidas autem et parricidas sive sacerdotum interfectores . . . per manum et ventrem ferratos de regno ejiciat ut instar Cain jugi et profugi circueant terram.—Leg. Bracilai Boæmor (Annal. Saxo ann. 1039). So also a century earlier for the murder of a chief.—Concil. Spalatens. ann. 927, can. 7 (Batthyani, I. 331).

ing from his liberated arm: a miracle gratefully recorded by the spiritual children of the saint.[1] Equally melodramatic in its details is a similar instance of an inhabitant of Prunay near Orléans, laden with three iron bands for fratricide. His weary pilgrimage was lightened of two by the intercession of St. Peter at Rome, and the third released itself in the most demonstrative manner through the merits of St. Bertin and St. Omer.[2] If the legend of St. Emeric of Hungary be true, the pope himself did not disdain to prescribe this ordeal to the criminal whose miraculous release caused the immediate canonization of the saint by a synod in 1073.[3] In France at one time we are told that this penance or punishment was habitual in cases of parricide or fratricide, when the rings or chains were wrought from the sword with which the crime had been committed.[4] Repentant sinners also frequently bound themselves with iron rings and chains by way of penance, and the spontaneous disruption of these, which sometimes occurred, was regarded as a sign that God had pardoned the penitent.[5] The shrine of St. Nicetius at Lyons had a special reputation in these cases, and the pile of broken rings and chains exhibited there in the sixth century testified to the power of the saint's intercession.[6]

The spirit of the age is likewise manifested in an appeal to Heaven which terminated a quarrel in the early part of the twelfth century between St. Gerald, Archbishop of Braga, and

[1] De Successoribus S. Hidulfi cap. xviii. (Patrolog. CXXXVIII. p. 218). A similar case attested the sanctity of St. Mansuetus (Vit. S. Mansueti Lib. II. c. 17.—Martene et Durand. Thesaur. III. 1025).

[2] Folcardi Mirac. S. Bertin. Lib. I. c. 4.

[3] Batthyani, Legg. Eccles. Hung. T. I. p. 413. See also Mirac. S. Swithuni c. ii. § 32.—Mirac. S. Yvonis c. 21 (Patrol. CLV. 76, 91). Various other instances may be found in Muratori, Antiq. Med. Ævi, Diss. 23. Charlemagne seems to have considered it a deception to be restrained by law.—Car. Mag. cap. I. ann. 789, § lxxvii.

[4] Martene de antiquis Ecclesiæ Ritibus Lib. I. cap. vi. art. 4 n. 12.

[5] Cæsar. Heisterb. Dial. Mirac. Dist. XI. c. xxvii. xxix.

[6] Greg. Turonens. Vitæ Patrum, Cap. viii. n. 10.

a magnate of his diocese, concerning the patronage of a church. Neither being inclined to yield, at length the noble prayed that God would decide the cause by not permitting the one who was in the wrong to live beyond the year, to which St. Gerald assented; and in six months the death of the unhappy noble showed how dangerous it was to undertake such experiments with a saint.[1] This, indeed, may be held to have warrant of high authority, for when, in 336, Alexander Bishop of Constantinople was about to engage in disputation with the arch-heretic Arius, he underwent a long fast, and shut himself up for many days and nights alone in his church praying to God, and finally supplicating that if his faith were wrong he might not live to see the day of contest, while if Arius were in error he likewise might be taken off in advance; and the orthodoxy of the Nicene creed was confirmed miraculously by the sudden and terrible death of Arius within a few days.[2]

The error of the Arian doctrine of the Trinity was demonstrated by another volunteer miracle about the year 510, when Deuterius the Arian Bishop of Constantinople undertook to baptize a convert in the name of the Father through the Son in the Holy Ghost, and was rebuked for using this heretical formula by the sudden disappearance of all the water in the font.[3]

With these examples may be classed a trial of faith proposed by Herigarius, one of the earliest Christian converts of Sweden, as conclusive, though not so dangerous as that of Bishop Poppo. After frequent disputes with his Pagan neighbors, he one day suggested, when a storm was approaching, that they

[1] Bernald. Vit. S. Gerald. cap. xv. (Baluz et Mansi I. 134).

[2] Socratis Hist. Eccles. Lib. I. c. 25.

[3] Theodori Lector. H. E. Lib. II. When, about the year 500, St. Avitus bishop of Vienne was disputing with the Arians before King Gundobald, he offered to leave the decision as to the rival faiths to Heaven by both parties going to the tomb of St. Justus and appealing to him, but the Arians prudently refused to imitate Saul and practise necromantic arts.—Collatio Episcoporum coram R. Gundebaldo (Migne's Patrologia, LIX. 391).

should stand on one side and he on the other, and see which of them would get wet. The rain came down in torrents and nearly drowned the heathen scoffers, while Herigarius and a boy in his company serenely looked on, untouched by a single drop.[1]

When, at the end of the ninth century, the attacks of Rollo and his Normans drove the monks of St. Martin of Tours to seek safety for themselves and the priceless relics of their saint at Auxerre, the body of St. Martin was deposited in the church of St. Germain near the tomb of the latter. The miracles wrought by the newcomer speedily caused a large influx of oblations which the strangers took to themselves. The monks of St. Germain claimed an equal share on the ground that the miracles were wrought by the combined merits of both saints. The Touraingeois resisted the demand, and finally offered to decide the question by taking a leper and placing him for a night between the rival reliquaries. If he should in the morning be entirely cured, they agreed to admit that both saints were concerned in the miracles, and that the receipts should be shared; but if only one side of him was restored to health then the saint on whose side he was cured should have the credit and his monks the money. This was agreed to; the leper was placed between the tombs, and both parties spent the night in prayer. In the morning he was found with the half of him towards St. Martin sound and well, while the side towards St. Germain had not been in the least benefited. To remove any lingering doubts, he was then turned around, and the other side was cured. The result was beyond further question, and the monks of St. Martin were permitted to enjoy in peace thenceforth the offerings of the faithful.[2]

It occasionally happened that the direct interference of Heaven, without the use of formulas, was volunteered to stay

[1] Remberti Vit. St. Anscharii c. xvi. (Langebek I. 458–9).

[2] Gesta Consul. Andegavens. c. iii. § 16 (D'Achery III. 241).

the blundering hand of human justice. In 1219, near Cologne, a man was condemned for theft and promptly hanged, but when the spectators supposed him comfortably dead, he suddenly exclaimed, "Your labor is vain; you cannot strangle me, for my lord bishop St. Nicholas is aiding me. I see him." Taking this for a convincing proof of his innocence, the crowd at once cut him down, and he hastened to the church of Bruweiler to give thanks for his miraculous escape.[1] It is curious to observe, however, that the pious contemporary narrator of this instance of the power of St. Nicholas is careful to let us understand that the man may have been guilty after all. St. Olaf of Norway once interfered in the same way to support, during nine hours of suspension, a man unjustly hanged on a false accusation of theft.[2]

Heaven could also be directly appealed to without the intervention of the hot iron or boiling water. A question of much importance to northern Italy was thus settled in the tenth century, when Uberto of Tuscany, driven into exile by Otho the Great, returned after a long absence, and found his wife Willa with a likely boy whose paternity he refused to acknowledge. After much parleying, the delicate question was thus settled. A large assembly, consisting principally of ecclesiastics, was convened, in which Uberto sat without anything to distinguish him. The boy, who had never seen him, was placed in the centre, and prayers were offered by all present that he should be led by divine instinct to his father. The prayers were promptly answered, for he rushed without hesitation to the arms of Uberto, who could no longer indulge in unworthy doubts, and in time Ugo became the most powerful prince of Italy.[3]

There would appear to have been a form of ordeal known as the judgment of the Holy Ghost, but its details are unknown.

[1] Cæsar. Heisterbach Dial. Mirac. Dist. VIII. c. lxxiii.

[2] Legendæ de S. Olavo (Langebek II. 551–2).

[3] Pet. Damian. Opusc. LVII. Diss. ii. c. 3, 4.

Pope Stephen VII. employed it for the condemnation of the body of his predecessor Pope Formosus, in 896. The corpse was dug up for the purpose, clad in papal vestments, and brought before a synod of bishops; after condemnation, the three fingers used in benediction were cut off, and it was cast into the Tiber. After the murder of Stephen in 898, John IX. assembled another council which annulled the condemnation and forbade such proceedings in the future, for the unanswerable reason that a dead body cannot vindicate itself, and the judgment was still further discredited when the corpse was fished out of the river, and on being brought into St. Peter's all the sacred images there bowed to it. Whatever may have been the judgment of the Holy Ghost it naturally became obsolete.[1]

Perhaps the simplest and at the same time one of the most barbarous of ordeals is prescribed in a MS. of the eleventh century for Jews unlucky enough to be involved in controversies with Christians. The Jew was made to stand up and his knees were closely bound together; a collar made of brambles was placed around his neck, and a switch of brambles, five cubits long and well furnished with thorns, was smartly dragged between his thighs. If he escaped without a scratch he was acquitted.[2]

In the crazied effort to detect the all-pervading and secret crime of witchcraft, a number of superstitious observances found currency among the people which practically assumed the position of ordeals. Thus in the latter half of the sixteenth century it was believed that a fragment of earth from a grave, when sanctified in the Mass and placed on the threshold of a church door, would prevent the egress of any witch who might be within; and a similar power was attributed to a splinter of oak from a gallows, sprinkled with holy water and hung up in the church porch.[3]

[1] Conc. Roman. ann. 904 (898) c. 1 (Harduin. VI. 1. 487).—Liutprand. Antapodos. Lib. 1. c. 30, 31.

[2] Patetta, Le Ordalie, p. 218.

[3] Wieri de Præstigiis Dæmonum, pp. 589–90.

CHAPTER XV.

CONDITIONS OF THE ORDEAL.

THE ordeal was thoroughly and completely a judicial process, ordained by the law for certain cases, and carried out by the tribunals as a regular form of ordinary procedure. From the earliest times, the accused who was ordered to undergo the trial was compelled to submit to it, as to any other decree of court. Thus, by the Salic law, a recusant was summoned to the royal court; and if still contumacious, he was outlawed and his property confiscated, as was customary in all cases of contempt.[1] The directions of the codes, as we have seen, are generally precise, and admit of no alternative.[2] Occasionally, however, a privilege of selection was afforded between this and other modes of compurgation, and also between the various forms of ordeal.[3]

There was, however, a remarkable exception to this enforcement of the ordeal in a provision existing in some codes by which a man condemned to it could buy himself off by compounding with his adversary. This mode of adjustment was not extensively introduced, but it nevertheless existed among

[1] That this was a settled practice is shown by its existence in the earliest text of the law (Tit. LVI.) as well as in the latest (L. Emend. Tit. LIX.).

[2] Si aufugerit et ordalium vitaverit, solvat plegius compellanti captale suum et regi weram suum.—L. Cnuti Sæc. cap. xxx.—See also cap. xli.

[3] Et eligat accusatus alterutrum quod velit, sive simplex ordalium, sive jusjurandum unius libre in tribus hundredis super XXX. den.—L. Henrici I. cap. LXV. § 3. By the municipal codes of Germany, a choice between the various forms of ordeal was sometimes allowed to the accused who was sentenced to undergo it.—Jur. Provin. Alaman. cap. xxxvii. §§ 15, 16. Jur. Provin. Saxon. Lib. I. Art. 39.

the Anglo-Saxons,[1] while among the Franks it was a settled custom, permitted by all the texts of the Salic law, from the earliest to the latest.[2] By this a person condemned by the court to undergo the ordeal could, by a transaction with the aggrieved party, purchase the privilege of clearing himself by canonical purgation, and thus escape the severer trial. He was bound to pay his accuser only a portion of the fine which he would incur if proved guilty—a portion varying with different offences from one-fourth to one-sixth of the *wer-gild*. The interests of the tribunal were guarded by a clause which compelled him to pay to the *grafio*, or judge, the full *fredum*, or public fine, if his conscience impelled him to submit to an arrangement for more than the legal percentage. Even as late as 1229, by the Bohemian laws of Ottokar Premislas the accused could escape the ordeal by paying seven deniers to the seigneur.[3]

The circumstances under which its employment was ordered varied considerably with the varying legislations of races and epochs; and to enter minutely into the question of the power of the court to decree it, or the right to demand it by the appellant or the defendant, would require too much space, especially as this has already been discussed at some length with regard to one of its forms, the wager of battle. In India, the accused was required to undergo the risk of a fine if he desired to force his adversary to the ordeal; but either party could voluntarily undertake it, in which case the other was subject to a mulct if defeated.[4] The character of the defendant, however, had an important bearing upon its employment. If he had already been convicted of a crime or of perjury he was subject to it in all cases, however trifling; if, on the other hand, he was a man of unblemished reputation, he was not to be exposed to it, however important was the

[1] Dooms of Ethelstan, I. cap. 21.

[2] First Text, Tit. LIII. and L. Emend. Tit. LV.

[3] Jura primæva Moraviæ, Brunæ, 1781, p. 27.

[4] Yajnavalkya, II. 96.

case.[1] In civil cases, however, it apparently was only employed to supplement deficient evidence.—"Evidence consists of writings, possession, and witnesses. If one of these is wanting, then one of the ordeals is valid."[2]

In Europe there appears at times to have been a custom under which, when the accused had escaped in the ordeal, the accuser was obliged to undergo it. Thus in the Frisian law, when a man accused of theft proved his innocence by the ordeal, the accuser was then obliged to clear himself of the charge of perjury by a similar trial,[3] but the law fails to define what are their respective positions if the second ordeal proves likewise innocuous. In the case of bier-right quoted above from Scott's Border Minstrelsy, this secondary ordeal seems to have been to prove whether the accuser herself was not the guilty person. In the heroic poems of the Elder Edda a similar trial appears to be resorted to, as in the Frisian laws, only for the purpose of showing the false witness borne by the accuser. When Gudrun the wife of Atli is defamed as an adulteress by the concubine Herkia, and is forced to the ordeal—

She to the bottom plunged
Her snow-white hand,
And up she drew
The precious stones.
"See now, ye men,
I am proved guiltless
In holy wise,
Boil the vessel as it may."
Laughed then Atli's
Heart within his breast
When he unscathed beheld
The hand of Gudrun.

"Now must Herkia
To the cauldron go,
She who Gudrun
Had hoped to injure."
No one has misery seen
Who saw not that,
How the hand there
Of Herkia was hurt.
They then the woman led
To a foul slough.
So were Gudrun's
Wrongs avenged.[4]

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[1] Institutes of Vishnu, IX. 18–19.

[2] Yajnavalkya, II. 22.

[3] Leg. Frisión. Tit. III. c. 8, 9.

[4] Guthrunarkvida Thridja, 9, 10 (Thorpe's Elder Edda, pp. 106–7).

Churchmen held that if the accused escaped in the ordeal the accuser was guilty of perjury and homicide and must atone for it by public penitence.[1]

The absence of satisfactory testimony, rendering the case one not to be solved by human means alone is frequently, as in India, alluded to as a necessary element;[2] and indeed we may almost assert that this was so, even when not specifically mentioned, as far as regards the discretion of the tribunal to order an appeal to the judgment of God. Yet there were some exceptions to this, as in the early Russian legislation, where the ordeal is prescribed for the accused in all cases in which the accusation is substantiated by testimony;[3] and a law of King Ethelred seems to indicate that the plaintiff might require his adversary to submit to it,[4] while numerous examples

[1] Roberti Pulli Sententt. Lib. VI. cap. liv. (Migne's Patrologia, T. CLXXXVI. p. 905).

[2] Si certa probatio non fuerit.—L. Sal. Tit. XIV. XVI. (MS. Guelferbyt). The same is found in the Pact. Childeberti et Chlotarii § 5.—Decret. Chlotarii II. ann. 595, § 6.—Capit. Carol. Calvi, ann. 873, cap. 3, 7.—Cnuti Constit. de Foresta § 11: "Sed purgatio ignis nullatenus admittatur nisi ubi nuda veritas nequit aliter investigari."—In the customs of Tournay in 1187, when a man has been wounded and has no witnesses the accused can clear himself with six conjurators if the affair occurred in the daytime, but if at night he is forced to the cold-water ordeal (Consuet. Tornacens. § ii. *ap.* D'Achery, Spicileg. III. 551). Horne's Myrror of Justice, cap. III. Sect. 23: "En case ou battaille ne se poit joindre ne nul tesmognage n'avoit lieu . . . . e le actor n'ad point de testmoignes a prover sa action, adonque estoit en le volunt del deffendant a purger sa fame per le miracle de Dieu." Yet in an English case of murder early in the thirteenth century, the accused was found with the murdered man's cap and the knife with which he had been slain, and the whole vicinage testified to it, yet he was allowed to purge himself with the water ordeal.—Maitland, Pleas, etc., p. 80.

[3] Ruskaia Prawda, art. 28. Even the evidence of a slave was sufficient to condemn the accused to the red-hot iron. If he escaped, the accuser paid him a small fine, which was not required if the witnesses had been freemen. In all cases of acquittal, however, there were fines payable to the sovereign and to the ministers of justice.

[4] Et omnis accusator vel qui alium impetit, habeat optionem quid velit,

among those cited above authorize the conclusion that an offer on the part of the accused was rarely refused, even when there was strong evidence against him,[1] though this laxity of practice was occasionally objected to stoutly.[2] When the custom was declining, indeed, a disposition existed to require the assent of both parties before the tribunal would allow a case to be thus decided.[3] In civil cases, we may assume that absence of testimony, or the consent of both parties, was requisite to its employment.[4]

sive judicium aque vel ferri . . . . et si fugiet (accusatus) ab ordalio, reddat eum plegius wera sua.—Ethelr. Tit. III. c. vi. (Thorpe II. 516).

[1] Thus, in the Icelandic code—"Quodsi reus ferrum candens se gerere velle obtulerit, hoc minime rejiciatur."—Grágás, Sect. VI. c. 33. So in the laws of Bruges in 1190 (§ 31), we find the accused allowed to choose between the red-hot iron and a regular inquest—"Qui de palingis inpetitur, si ad judicium ardentis ferri venire noluerit, veritatem comitis qualem melius super hoc inveniri poterit, accipiet" (Warnkönig, Hist. de la Fland. IV. 372)—showing that it was considered the most absolute of testimony. And in a constitution of Frederic Barbarossa "Si miles rusticum de violata pace pulsaverit . . . . de duobus unum rusticus eligat, an divino aut humano judicio innocentiam suam ostendat."—Feudor. Lib. II. Tit. xxvii. § 3.

[2] Thus an anonymous ecclesiastic, in an epistle quoted by Juretus (Observat. in Ivon. Carnot. Epist. 74)—"Simoniaci non admittuntur ad judicium, si probabiles personæ, etiam laicorum, vel feminarum, pretium se ab eis recipisse testantur; nec aliud est pro manifestis venire ad judicium nisi tentare Dominum."

[3] Duellum vel judicium candentis ferri, vel aquæ ferventis, vel alia canonibus vel legibus improbata, nullomodo in curia Montispessulani rati sunt, nisi utraque pars convenerit.—Statut. Montispess. ann. 1204 (Du Cange).

[4] Si accolis de neutrius jure constat, adeoque hac in re testimonium dicere non queant, tum judicio aquæ res decidatur.—Jur. Provin. Alaman. cap. cclxxviii. § 5.—Poterit enim alteruter eorum petere probationem per aquam (wasser urteyll) nec Dominus nec adversarius detrectare possit; sed non, nisi quum per testes probatio fieri nequit.—Jur. Feud. Alaman. cap. lxxvii. § 2.

"Aut veritas reperiatur de hoc per aquaticum Dei judicium. Tamen judicium Dei non est licitum adhiberi per ullam causam, nisi cujus veritas per justitiam non potest aliter reperiri, hoc terminabitur judicio Dei."—Jur. Feud. Saxon. § 100 (Senckenberg. Corp. Jur. Feud. German. p. 249).—So,

The comfort which the system must have afforded to indolent judges in doubtful cases is well exhibited by a rule in various ancient codes, by which a man suspected of crime, even though no accuser came forward, was thrown into prison and kept there until he could prove his innocence by the ordeal of water.[1] No testimony was required save that of evil repute. Thus in Hungary, in the eleventh century, a man who was regarded as a thief by the whole village was subjected to the ordeal: if he was cleared, he paid the fee to the priest; if he was convicted, all his property was confiscated.[2] This, in fact, was virtually the process adopted and systematized in England by the Assizes of Clarendon in 1166. The grand jury was directed to present all persons suspected of robbery, murder, theft, etc., when they were promptly sent to the water ordeal to prove their innocence.[3] Thus it afforded an unfailing solution to all doubts and simplified greatly the administration of criminal law, for it was equally applicable to cases of individual prosecutions. In 1201, for instance, a widow accuses a man of the murder of her husband and the court rejects her appeal because it does not state that she saw the deed, but as the jurors when interrogated say

also, in a later text, "judicium Domini fervida aqua vel ferro non licet in causa aliqua experiri, nisi in qua modis aliis non poterit veritas indagari."—Cap. xxiv. § 19 (Ibid. p. 337).

[1] Établissements de Normandie, Tit. de Prison (Éd. Marnier). Precisely similar to this was a regulation in the early Bohemian laws.—Bracilai Leges. (Patrol. CLI., 1258–9). And an almost identical provision is found in the Anglo-Saxon jurisprudence.—L. Cnuti Sæc. cap. xxxv.—L. Henric. I. cap. lxi. § 5.—See, also, Assises de Jerusalem, Baisse Court, cclix.

[2] Batthyany, Legg. Eccles. Hung. II. 105.

[3] Et qui inveniatur per sacramentum prædictorum rettatus vel publicatus quod fuerit robator vel murdrator vel latro vel receptor eorum, postquam dominus rex fuit rex, capiatur et eat ad juisiam aquæ.—Assisa de Clarenduna § 2 (Stubbs, Select Charters, p. 137). For examples, see Maitland, Pleas, pp. 3, 4, 5, etc.

that the accused is suspected of the crime, he is ordered at once to the ordeal.[1]

We have seen above occasional instances in which the accuser or plaintiff offered to substantiate his veracity by an appeal to the ordeal. This was an established rule with regard to the wager of battle, but not as respects the other forms of the judgment of God, which were regarded rather as means of defence than of attack. Still there are occasional instances of instructions for their employment by the accusing party. In the primitive laws of Russia, an accuser who could not substantiate his case with witnesses was obliged to undergo the ordeal of red-hot iron.[2] In England it seems to have been within the discretion of the court to order it for either the accuser or the accused. A very singular case is recorded in 1202, in which Astin of Wispington accused Simon of Edlington of assaulting him and putting out an eye, when the court adjudged the red-hot iron ordeal and gave to the defendant the option whether he or the prosecutor should undergo it; Simon naturally preferred that his antagonist should try the dangerous experiment, and the result was that the case was settled without it.[3] We have already seen (p. 385) that in some places where the accused succeeded in clearing himself by the ordeal the accuser was obliged to undergo it in order to determine the question of his perjury.

Sometimes the ordeal was employed in connection with compurgation, both for prosecution and defence, to supplement the notorious imperfections of that procedure. Thus Archbishop Hincmar directs that cases of complaint against priests for dissolute life shall be supported by seven witnesses, of whom one must submit to the ordeal to prove the truth of his companions' oaths, as a wholesome check upon perjury and subornation.[4] With a similar object, the same prelate likewise

[1] Maitland, Pleas, etc., I. 1. P. 75 is a case of a youth detained in prison and sent to the ordeal apparently without a trial.

[2] Ruskaia Prawda, Art. 28. [3] Maitland, Pleas, etc., I. 10.

[4] Hincmari Capit. Synod. ann. 852, II. xxi.

enjoins it on compurgators chosen by the accused, on his failing to obtain the support of those who had been selected for him by his judge.[1] Allied to this was a rule for its employment which was extensively adopted, allowing the accused the privilege of compurgation with conjurators in certain cases, only requiring him to submit to the ordeal on his failing to procure the requisite number of sponsors. Thus, in 794, a certain Bishop Peter, who was condemned by the Synod of Frankfort to clear himself, with two or three conjurators, of the suspicion of complicity in a conspiracy against Charlemagne, being unable to obtain them, one of his vassals offered to pass through the ordeal in his behalf, and on his success the bishop was reinstated.[2] That this was strictly in accordance with usage is shown by a very early text of the Salic Law,[3] as well as by a similar provision in the Ripuarian code.[4] Among the Anglo-Saxons it likewise obtained, from the time of the earliest allusion to the ordeal occurring in their jurisprudence, down to the period of the Conquest.[5] Somewhat similar in tendency was a regulation of Frederic Barbarossa, by which a slave suspected of theft was exposed to the red-hot iron unless his master would release him by an oath.[6] Occasionally it was also resorted to when the accused was outsworn after having endeavored to defend himself by his oath or by conjurators. Thus a canon of the Council of Tribur in 895

[1] Hincmari Epist. xxxiv.

[2] Capit. Car. Mag. ann. 794, § 7.

[3] Se juratores non potuerit invenire, aut ad ineum ambulat aut, etc.—MS. Guelferbyt. Tit. XIV.

[4] Quod si . . . . juratores invenire non potuerit, ad ignem seu ad sortem se excusare studeat.—L. Ripuar. Tit. xxxi. § 5.

[5] Dooms of Edward the Elder, cap. iii. So also in the laws of William the Conqueror, Tit. I. cap. xiv.—"Si sen escundira sei duzime main. E si il auer nes pot, si sen defende par juise." The collection known by the name of Henry I. has a similar provision, cap. lxvi. § 3.

[6] Radevic. de Reb. Frid. Lib. I. cap. xxvi. This was an old feature of the Barbarian codes which continued till late in the Middle Ages. See *ante*, p. 22.

declares that if a man is so generally suspected that he is outsworn iñ compurgation, he must either confess or submit to the hot-iron ordeal.[1] Popular belief evidently might give to the accuser a larger number of men willing to associate themselves in the oath of accusation than the defendant could find to join him in rebutting it, and yet his guilt might not as yet be clear. In such cases, the ordeal was a most convenient resort.

These regulations give to the ordeal decidedly the aspect of punishment, as it was thus inflicted on those whose guilt was so generally credited that they could not find comrades to stand up with them at the altar as partakers in their oath of denial; and this is not the only circumstance which leads us to believe that it was frequently so regarded. This notion is visible in the ancient Indian law, where, as we have seen, certain of the ordeals—those of red-hot iron, poison, and the balance—could not be employed unless the matter at stake were equivalent to the value of a thousand pieces of silver, or involved an offence against the king;[2] and it reappears in Europe in the graduated scale of single and triple ordeals for offences of different magnitudes. Such a scheme is so totally at variance with the theory of miraculous interposition to protect innocence and punish guilt, that we can only look upon it as a mode of inflicting graduated punishments in doubtful cases, thus holding up a certain penalty *in terrorem* over those who would otherwise hope to escape by the secrecy of their crime—no doubt with a comforting conviction, like that of Legate Arnaud at the sack of Béziers, that God would know his own. This same principle is visible in a provision of the charter of Loudun, granted by Louis le Gros in 1128, by which an assault committed outside of the liberties of the commune could be disproved by a simple sacramental oath; but if within the limits of the commune, the accused was

[1] Concil. Tribur. ann. 895, can. xxii.

[2] Yajnavalkya, II. 99.

obliged to undergo the ordeal.[1] In another shape we see it in the customs of Tournay, granted by Philip Augustus in 1187, where a person accused of assault with sharpened weapons, if there were no witnesses, was allowed to purge himself with six conjurators if the affair occurred in the daytime, but if at night, was obliged to undergo the water ordeal.[2] Further illustration is afforded by the principle, interwoven in various codes, by which a first crime was defensible by conjurators, or other means, while the *tiht-bysig* man, the *homo infamatus*, one of evil repute, whose character had been previously compromised, was denied this privilege, and was forced at once to the hot iron or the water. Thus, among the Anglo-Saxons, in the earliest allusion to the ordeal, by Edward the Elder, it is provided that perjured persons, or those who had once been convicted, should not be deemed thereafter oath-worthy, but should be hurried to the ordeal; a regulation repeated with some variations in the laws of Ethelred, Cnut, and Henry I.[3] The Carlovingian legislation establishes a similar principle,[4] while the canons of Burckhardt show it to be still in force in the eleventh century.[5] A hundred and fifty years later, the legislation of Flanders manifests the same tendency, the code granted to Bruges in 1190 providing that a first accusation of theft should be decided by witnesses, while a second was to be met by the cold-water ordeal.[6] In the German municipal law of the thirteenth century, the same principle is observable. A man who had forfeited his legal privileges by conviction for theft or similar crimes was no longer admitted to the oath, but

[1] Chart. Commun. Laudun. (Baluz. et Mansi IV. p. 39).

[2] Consuetud. Tornacens. § iii. (D'Achery III. 551). See above, p. 54.

[3] Ut deinceps non sint digni juramento sed ordalio.—Legg. Edwardi cap. iii.; Æthelredi cap. i. § 1; Cnuti Sæcul cap. xxii. xxx.; Henrici I. cap. lxv. § 3.

[4] Capit. Car. Mag. I. ann. 809, cap. xxviii.—Capit Ludov. Pii. I. ann. 819.

[5] Burchardi Decret. Lib. XVI. cap. 19.

[6] Keure de la Châtellenie de Bruges, § 28 (Warnkönig, Hist. de la Fland. IV. 371).

on subsequent accusations was compelled to choose between the hot iron, the cauldron, and a combat with a champion; and similarly an officer of the mint issuing false money was permitted the first time to swear to his ignorance, but on a second offence he had to submit to the ordeal. In the codes in force throughout Germany, indeed, previous suspicion was sufficient to send the accused to the ordeal in place of the oath.[1] The contemporary jurisprudence of Spain has a somewhat similar provision, by which a woman accused of homicide could not be exposed to the ordeal unless she could be proved utterly abandoned, for which a curious standard was requisite;[2] while for more serious crimes, such as sorcery or killing her husband, she was forced at once to the red-hot iron to prove her innocence. In the legislation of Charlemagne there is an elaborate provision, by which a man convicted seven times of theft was no longer allowed to escape on payment of a fine, but was required to undergo the ordeal of fire. If he succumbed, he was put to death; if he escaped unhurt, he was not discharged as innocent, but his lord was allowed to enter bail for his future good behavior[3]—a mode at once of administering punishment and of ascertaining whether his death would be agreeable to Heaven. When we thus regard it as a penalty on those who by misconduct had forfeited the confidence of their fellow-men, the system loses part of its absurdity, in proportion as it departs from the principle under which it was established.

There is also another aspect in which it is probable that the ordeal was viewed by those whose common sense must have shrunk from it as a simple appeal to the judgment of God. There can be little doubt that it was frequently found of mate-

[1] Jur. Provin. Alaman. cap. clxxxvi. §§ 4, 6, 7; cap. cccIxxiv.—Jur. Provin. Saxon. Lib. I. Art. 39.—Sachsische Weichbild, Art. xcii. § 2.—Richstich Landrecht, cap. lii.

[2] Si non fuere provada por mala, que aya yazido con cinco omes.—Fuero de Baeça (Villadiego, Fuero Juzgo, fol. 317 *a*).

[3] Capit. Car. Mag. III. ann. 813, cap. 46.

rial use in extorting confession or unwilling testimony. By the early codes, as in the primitive Greek and Roman law, torture could be applied only to slaves, and the ordeal was a legalized torture, applied under circumstances peculiarly provocative of truth, and as such we occasionally find regulations which enable the freeman to escape by compurgation, while the slave is required to undergo the ordeal.[1] The elaborate nature of the ritual employed, with its impressive adjurations and exorcisms, was well fitted to excite the imagination and alarm the conscience; sometimes, indeed, to render it more effective, the mass celebrated was a mortuary one, which when sung for a living man was popularly believed to possess deadly powers of peculiar efficacy.[2] In those ages of faith, the professing Christian, conscious of guilt, must indeed have been hardened who could undergo these awful rites, pledging his salvation on his innocence, and knowing under such circumstances that the direct intervention of Heaven could alone save him from having his hand boiled to rags,[3] after which he was

[1] Concil. Mogunt. ann. 847, can. xxiv.—Burchardi Decret. Lib. XVI. cap. 19.—Keure de Gand, §§ 7, 8, 12 (Warnkönig, II. 228).

The law of William the Conqueror (Tit. II. c. 3.—Thorpe, I. 488) by which the duel was reserved for the Norman, and the vulgar ordeal for the Saxon, might be supposed to arise from a similar distinction. In reality, however, it was only preserving the ancestral customs of the races, giving to the defendant the privilege of his own law. The duel was unknown to the Anglo-Saxons, who habitually employed the ordeal, while the Normans, previous to the Conquest, according to Houard, who is good authority (Anc. Loix Franc. I. 221–222), only appealed to the sword.

[2] Martene de Antiq. Eccl. Ritibus Lib. III. c. vii. Ord. 6. For the beliefs connected with mortuary masses see Concil. Toletan XVII. ann. 694 c. 5; D'Argentré Collect. Judic. de novis Error. I. II. 344; Angeli de Clavasio Summa Angelica s. v. *Interrogationes;* Diaz de Luco, Practica Criminalis Canonica cap. xxxv.; Grillandi de Sortilegiis q. xiv.

[3] The severity of the ordeal, when the sufferer had no friends among the operators to save him, may be deduced from the description of a hand when released from its three days' tying up after its plunge in hot water: "inflatam admodum et excoriatam sanieque jam carne putrida effluentem dexteram invitus ostendit" (Du Cange, s. v. *Aquæ Ferv. Judicium*). In this

to meet the full punishment of his crime, and perhaps in addition lose a member for the perjury committed. With such a prospect, all motives would conspire to lead him to a prompt and frank acknowledgment in the early stages of the proceedings against him. These views are strengthened by the fact that when, in the thirteenth century, the judicial use of torture, as a means of obtaining testimony and confession, was becoming systematized and generally employed, the ordeal was falling into desuetude and rapidly disappearing. The latter had fulfilled its mission, and the former was a substitute better fitted for an age which reasoned more, believed less, and at the same time was quite as arbitrary and cruel as its predecessor. A further confirmation of this supposition is afforded by the coincidence that the only primitive jurisprudence which excluded the ordeal—that of the Wisigoths—was likewise the only one which habitually permitted the use of torture,[1] the only reference to the ordeal in their code being a provision which directs its employment as a preliminary to the more regular forms of torture.

In fact, the ordeal was practically looked upon as a torture by those whose enlightenment led them to regard as a superstition the faith popularly reposed in it. An epistle which is attributed both to Stephen V. and Sylvester II. condemns the whole system on the ground that the canons forbid the extortion of confessions by heated irons and boiling water; and that a credulous belief could not be allowed to sanction that which was not permitted by the fathers.[2] When, therefore, at the Council of St. Baseul, a priest named Adalger, in confessing the assistance he had rendered to Arnoul of Reims during Charles of Lorraine's resistance to the usurpation of

case, the sufferer was the adversary of an abbey, the monks of which perhaps had the boiling of the caldron.

[1] L Wisig. L. VI. Tit. i. § 3.

[2] Ivon. Carnot. Epist. 74; Ejusd. Decr. X. 27.—C. 20 Decr. Caus. II. q.v. This epistle is generally attributed to Stephen V., but two MSS. of Ivo of Chartres ascribe it to Sylvester II. (Migne's Patrologia CLXII. 96).

Hugh Capet, offered to substantiate his testimony by undergoing the ordeal, he did it in terms which show that he expected it to be regarded as a torture giving additional weight to evidence—"If any of you doubt this and deem me unworthy of belief, let him believe the fire, the boiling water, the glowing iron. Let these tortures convince those who disbelieve my words."[1] It is observable that he omits the cold-water as not being a torture, just as in the ancient Indian law the limitation referred to above as applicable to the red-hot iron, the poison, and the balance, did not apply to the cold-water ordeal, or to that in which was administered the water in which an idol had been dipped.[2]

In the same way, some among the European ordeals, such as that of the Eucharist, of bread and cheese, and bier-right, do not come within the class of tortures, but they addressed themselves powerfully to the conscience and imagination of the accused, whose callous fortitude no doubt often gave way under the trial. In our own country, and almost within our own time, the latter ordeal was revived in one instance with this object, and the result did not disappoint the expectations of those who undertook it. In the case of People *vs.* Johnson, tried in New York in 1824, the suspected murderer was led from his cell to the hospital where lay the body of the victim, which he was required to touch. Dissimulation which had been before unshaken failed him at the awful moment; his overstrung nerves gave way, and a confession was faltered forth. The proceeding was sustained by court, and a subsequent attempt at retraction was overruled.[3] The powerful influence of such feelings is shown in a custom which, as recently as 1815, was still employed at Mandeure, near Montbelliard, and which is said to be even yet in use in some of

[1] Concil. Basol. cap. xi. Rainer, private secretary of Arnoul, offered to prove his statement by giving up a slave to walk the burning ploughshares in evidence of his truth (Ibid. cap. xxx.).

[2] Yajnavalkya, II. 99.

[3] Wharton and Stillé's Med. Jurisp., 2d Edit. 1860.

the remoter districts of the Ardennes. When a theft has been committed, the inhabitants are summoned to assemble after vespers on Sunday at the place of judgment. There the mayor calls upon the guilty person to make restitution and live in isolation for six months. If this appeal prove fruitless, recourse is had to the trial of the staff, in which two magistrates hold aloft a piece of wood, under which every one is bound to pass. No instance, it is said, is on record in which the culprit dares to do this, and he is always left alone.[1] Very similar to this is the use made of the Clog Oir or golden bell of St. Senan, the founder of the monastery of Inniscattery, at the mouth of the river Shannon, which was supposed to have peculiar virtue in revealing culprits. A case occurred as late as 1834, when a farmer, who had lost a sum of twenty pounds by a burglary, had the bell brought to his house with much ceremony, and the following Sunday was appointed for the whole parish to appear and clear themselves upon it. On Saturday night, however, the stolen bank notes were thrown through a window of his house.[2] The method described above (p. 334), as practised in Southern Russia to detect household thieves, affords another example of the power exercised over a guilty conscience. It is easy thus to imagine how the other forms of ordeal may have conduced to the discovery of crime in ages of lively superstition. A case occurring about the commencement of the twelfth century is a fair illustration of the manner in which it frequently worked on the imagination of those whose lives or fortunes were at stake. André de Trahent, a vassal of the convent of St. Mary of Saintes, claimed certain property belonging to the convent. On the final hearing it was decreed that he must abandon his claim unless he could prove it by oath and ordeal. This he agreed to do, and on the appointed day he appeared with his

[1] Michelet, Origines du Droit, p. 349.—Proost, Jugements de Dieu, p. 80. This seems to be derived from the *skirsla* of the Norsemen described above.

[2] London Athenæum, Aug. 20, 1881, p. 247.

men ready to undergo the trial. As there were two pieces of property in question, two ordeals were required. The caldrons of water were duly heated and André's men were prepared for the attempt, when his courage gave way; he abruptly abandoned his claim and submitted himself to the mercy of the abbess.[1]

This case illustrates the fact that in the vulgar ordeals as well as in the duel champions were sometimes allowed. To how great an extent this was permitted it would now be difficult to assert. It is not specially alluded to in any body of laws, but numerous examples of it have been incidentally given above, and in some of the *ordines* it is assumed as a matter of course. In one for the cold-water ordeal the substitutes are described as children who are made to fast for forty days in advance, and carefully watched and washed to prevent any illusions of the devil.[2] In the ordeal of the cross, however, it was a recognized privilege of the old or infirm to put forward a substitute, and when communities or churches were pleaders a champion was of course a necessity. A still greater relaxation, occasionally permitted but not approved by the Church, was the practice of writing the name of the accused on paper or some other substance and submitting this to the ordeal in place of the individual himself.[3] Perhaps the most illogical use of a champion in an ordeal is one suggested by Hincmar of Reims in 860, that a satisfactory person should undergo it in order to determine whether the secret motive alleged by another person for not living with his wife were true or not.[4]

[1] Polyptichum Irminonis, App. No. 34 (Paris, 1836, p. 373).
[2] Martene, De Antiq. Eccles. Ritibus Lib. III. cap. vii. Ordo 5.
[3] Patetta, Le Ordalie, p. 192.
[4] Hincmari Remens. Epist. XXII. (Migne's Patrol. CXXVI. 136).

CHAPTER XVI.

CONFIDENCE REPOSED IN THE ORDEAL.

The degree of confidence really inspired by the results of the ordeal is a somewhat curious subject of speculation on which definite opinions are not easily reached. Judicially, the trial was, for the most part, conclusive; he who had duly sunk under water, walked unharmed among the burning shares, or withdrawn an unblistered hand from a caldron of legal temperature, stood forth among his fellows as innocent. So, even now, the verdict of a few fools or knaves in a jury-box may discharge a criminal, against the plainest dictates of common sense, but in neither case would the sentiments of the community be probably changed by the result. The reverential feelings which alone could impart faith in the system seem scarcely compatible with the practice of compounding for ordeals, which, as we have seen above (p. 384), was occasionally permitted.

Charlemagne, at the commencement of his reign, does not seem to have entertained much respect for the judgment of God when he prescribed the administration of the ordeal for trifling affairs only, cases of magnitude being reserved for the regular investigation of the law.[1] Thirty years later, the public mind appears afflicted with the same doubts, for we

[1] Quod si accusatus contendere voluerit de ipso perjurio stent ad crucem. . . . Hoc vero de minoribus rebus. De majoribus vero, aut de statu ingenuitatis, secundum legem custodiant.—Capit. Car. Mag. ann. 779, § 10. That this was respected as law in force, nearly a hundred years later, is shown by its being included in the collection of Capitularies by Benedict the Levite (Lib. v. cap. 196).

find the monarch endeavoring to enforce confidence in the system by his commands.[1] The repeated use of the ordeal in the affair of the divorce of Teutberga shows that it was expected to have no little effect on public opinion, and the same is seen when in 876 Charlemagne's grandson, Louis of Saxony, forced to defend his dominions against his uncle Charles le Chauve, commenced by proving the justness of his title by the judgment of God. After fasting and prayer ten of his followers were exposed to the ordeal of red-hot iron and ten each to those of cold and boiling water; all escaped without injury, and the righteousness of the verdict was shown soon after by the victory of Andernach, which sent the invader flying back to France.[2] Yet a rule of English law, nearly four hundred years later, during the expiring struggles of the practice, would show that the result was regarded as by no means conclusive. By the assizes of Clarendon in 1166, which directed that all malefactors defamed for murder, robbery, and other felonies should be at once tried by the water ordeal, it was provided that those who had confessed or who had been found in possession of stolen property should not be allowed the privilege of clearing themselves in this manner; and a still more irreverential rule decreed that those who were pronounced innocent by the judgment of God, if regarded as guilty by common report, should have eight days to quit the kingdom, under pain of outlawry.[3] In the revision of these laws, made at Northampton ten years later, it was provided that in all cases those who passed safely through the ordeal should give bail for their future good conduct, except in charges of murder or aggravated felony, when they were

[1] Ut omnes judicio Dei credant absque dubitatione.—Capit. Car. Mag. I. ann. 809, § 20.

[2] Aimoini Chron. Continuat. Lib. V. c. 34.

[3] Assisa facta apud Clarendune §§ 12, 13, 14 (Gesta Henrici II. T. II. p. clii.—M. R. Series). A case in accordance with this occurs in 1212 (Maitland, Pleas, I. 63).

banished within forty days, under penalty of outlawry as before.[1]

St. Ivo of Chartres, though he had no scruple in recommending and enjoining the ordeal for laymen, and, on one occasion at least, pronounced its decisions as beyond appeal, yet has placed on record his conviction of its insufficiency, and his experience that the mysterious judgment of God not infrequently allowed in this manner the guilty to escape and the innocent to be punished.[2] A case related by Peter Cantor in the twelfth century shows how recklessly it often was abused as a relief to careless judges in doubtful cases. Two Englishmen were returning in company from a pilgrimage to the Holy Land, when one of them wandered off to the shrine of St. Jago de Compostella, and the other went directly home. The kindred of the absent one accused the latter of murdering his companion; as no evidence was procurable on either side, he was hurried to the ordeal, convicted, and executed, shortly after which the missing man came back in safety.[3]

The manifest injustice of the decisions thus rendered by the ordeal put a severe strain on the faith of believers, and led them to the most ingenious sophistry for an explanation. When, in 1127, the sacrilegious murder of Charles the Good, Count of Flanders, sent a thrill of horror throughout Europe, Lambert of Redenberg, whose participation in the crime was notorious, succeeded in clearing himself by the hot iron. Shortly afterwards he undertook the siege of Ostbourg, which he prosecuted with great cruelty, when he was killed in a sally of the besieged. The pious Galbert assumes that Lambert, notwithstanding his guilt, escaped at the ordeal in consequence

[1] Gesta Henrici II. T. I. p. 108.—Cf. Bracton. Lib. III. Tract. ii. cap. 16 § 3.

[2] Simili modo, cauterium militis nullum tibi certum præbet argumentum, cum per examinationem ferri candentis occulto Dei judicio multos videamus nocentes liberatos, multos innocentes sæpe damnatos.—Ivon. Carnot. Epist. cccv.

[3] Pet. Cantor. Verb. Abbreviat. c. lxxviii.

of his humility and repentance, and philosophically adds: "Thus it is that in battle the unjust man is killed, although in the ordeal of water or of fire he may escape, if truly repentant."[1] The same doctrine was enunciated under John Cantacuzenes, in the middle of the fourteenth century, by a bishop of Didymoteichos in Thrace. A frail fair one being violently suspected by her husband, the ordeal of hot iron was demanded by him. In this strait she applied to the good bishop, and he, being convinced of her repentance and intention to sin no more, assured her that in such a frame of mind she might safely venture on the trial, and she accordingly carried the glowing bar triumphantly twice around the bishop's chair, to the entire satisfaction of her lord and master.[2]

In fact it was a recognized doctrine of the Church that confession, contrition, and absolution so thoroughly washed away a sin that a culprit thus prepared could safely tempt the justice of God. A case related by Cæsarius of Heisterbach as a most edifying example illustrates the curious nature of the superstition thus inculcated by the religious teachers of the period. In the diocese of Utrecht a fisherman notoriously maintained illicit relations with a woman, and fearing to be called to account for it by an approaching synod, where he would be convicted by the red-hot iron, and be forced to marry her, he consulted a priest. This ghostly counsellor advised him that, if he was firmly resolved to sin no more, he could safely deny the fact and endure the ordeal, after receiving absolution. The event verified the prediction; he carried the burning iron unhurt, and to the surprise of all the country round he was acquitted. Shortly afterwards, while in his boat, a companion expressed his wonder, when the fisherman, whose short-lived repentance was already over, boastingly struck his hand on the water, exclaiming, "It hurt me no more than that!" By the marvellous justice of God, the water was to

[1] Vit. Carol. Comit. Flandren. cap. xx.

[2] Collin de Plancy, *op. cit.* s. v. *Fer Chaud.*

him as red-hot iron, and as he hastily withdrew his hand the skin peeled off in strips.[1] Even as late as 1539, the learned Ciruelo reproves the use of ordeals because the accused, though innocent of the special crime at issue, may succumb in consequence of other offences; or though guilty may escape because he has confessed and received absolution; and he states that he had personally known more than one case in which women, rightly accused of adultery by their husbands and forced to undergo the ordeal, had thus succeeded in being acquitted.[2]

This doctrine of Ciruelo's that the innocent were sometimes liable to conviction on account of previous misdeeds was likewise a belief of old standing. We have already seen (p. 137) that there was papal authority for it in the wager of battle. A striking instance of the vague notions current is afforded in the middle of the eleventh century by a case related by Othlonus, in which a man accused of horse-stealing was tried by the cold-water ordeal and found guilty. Knowing his own innocence, he appealed to the surrounding monks, and was told that it must be in consequence of some other sin not properly redeemed by penance. As he had confessed and received absolution before the trial, he denied this, till one of them pointed out that in place of allowing his beard to grow, as was meet for a layman, he had impiously carried the smooth chin reserved for ecclesiastics. Confessing his guilt, promising due penance, and vowing never to touch his beard with a razor again, he was conducted a second time to the water, and being now free from all unrepented sin, he was triumphantly acquitted. It is added that, taking advantage of a quibble as to the kind of instrument employed, he lapsed again into the sin of shaving, when the anger of Heaven manifested itself by allowing him to fall into the hands of an enemy, who put out his eyes.[3]

[1] Cæsar. Heisterbach. Dial. Mirac. Dist. x. c. xxxv.

[2] Ciruelo, Reprovacion de las Supersticiones, P. II. c. vii.

[3] Othlon. Narrat. de Mirac. quod nuper accidit, &c. (Migne's Patrol. CXLVI. 243–4).

Yet, on the other hand, the ordeal sometimes was regarded as the most satisfactory kind of proof, entitled to respect beyond any other species of evidence. The age was not logical, men acted more from impulse than from reason, and the forms of jurisprudence were still in a state too chaotic for regular and invariable rules to be laid down. The confusion existing in the popular mind is well illustrated by a case occurring in the twelfth century. A serf of the Abbey of Marmoutiers married a serf who had been given by the Viscount of Blois to one of his retainers named Erbald. The husband purchased his wife's liberty, and by paying an additional sum had the deed of manumission confirmed by the viscount and viscountess. Years passed away, the serf and wife died, and then also their son, when their property fell to the abbey, which enjoyed it until the heirs of Erbald and the viscount claimed it. The monks produced the deeds of manumission, and the viscountess, then the only surviving witness to the transaction, testified to its authenticity, but to no purpose. The claimants demanded the wager of battle, and the monks, in refusing this as unsuited to their calling, were obliged to produce a man who offered to undergo the ordeal of red-hot iron to prove the validity of the deed. Then the claimants at last desisted, but still succeeded in extorting sixteen livres from the abbey as the price of appending their signatures to the controverted deed.[1]

In general, however, as the result depended mostly upon those who administered the ordeal, it conferred an irresponsible power to release or to condemn, and it would be expecting too much of human nature to suppose that men did not yield frequently to the temptation to abuse that power. When Sigurd Thorlaksson was accused by Saint Olaf the King of the murder of his foster-brother Thoralf, and offered to clear himself by the red-hot iron, King Olaf accepted his offer, and appointed the next day for the trial at Lygra, where the bishop

[1] Polyptichum Irminonis, App. No. 20 (Paris, 1836, p. 354).

was to preside over it. When Sigurd went back at night to his ship, he said to his comrades that their prospects were gloomy, for the king had probably caused himself the death of Thoralf, and then brought the accusation against them, adding, "For him, it is an easy matter to manage the iron ordeal so that I doubt he will come ill off who tries it against him;" whereupon they hoisted sail in the darkness and escaped to their home in the Faroe Islands.[1] The collusion thus hinted at must often have been practised, and must have shaken the most robust faith, and this cause of disbelief would receive additional strength from the fact that the result itself was not seldom in doubt, victory being equally claimed by both parties. Of this we have already seen examples in the affairs of the lance of St. Andrew and of the Archbishop of Milan, and somewhat similar is an incident recorded by the Bollandists in the life of St. Swithin, in which, by miraculous interposition, the opposing parties beheld entirely different results from an appeal to the red-hot iron.[2]

Efforts of course were made from time to time to preserve the purity of the appeal, and to secure impartiality in its application. Clotair II., in 595, directs that three chosen persons shall attend on each side to prevent collusion;[3] and among the Anglo-Saxons, some four hundred years later, Ethelred enjoins the presence of the prosecutor under penalty of loss of suit and fine of twenty *ores*, apparently for the same object, as well as to give authenticity to the decision.[4] So in Hungary, the laws of St. Ladislas, in 1092, direct that three sworn witnesses shall be present to attest the innocence or guilt of the

[1] Olaf Haraldssons Saga, cxlv. (Laing's Heimskringla, II. 210).

[2] Enimvero mirum fuit ultra modum, quod fautores arsuram et inflationem conspiciebant; criminatores ita sanam ejus videbant palmam, quasi penitus fulvum non tetigisset ferrum.—Mirac. S. Swithuni c. ii. § 37. In this case the patient was a slave, whose master had vowed to give him to the Church in case he escaped.

[3] Ad utramque partem sint ternas personas electas, ne conludius fieri possit.—Decret. Chlotharii II. cap. VII.

[4] Ethelred, III. § 4.

accused as demonstrated by the result.[1] A rule announced by the Council of Grateley in 928, that if the accused is accompanied by more than twelve comrades he shall be adjudged as though he had failed in the ordeal, points to an obvious source of miscarriage of justice by which a crowd of partisans could interfere with the proceedings and then proclaim that the result had been successful.[2] A law adopted by the Scottish Parliament under William the Lion, in the second half of the twelfth century, shows that corruption was not uncommon, by forbidding those concerned in the administration of ordeals from receiving bribes to divert the course of justice,[3] and a further precaution was taken by prohibiting the Barons from adjudging the ordeal without the intervention of the sheriff to see that law and justice were observed.[4]

In spite of all that we have seen, the ordeal, with its undoubted cruelty, was not as cruel as it appears to us, and in its practical results it probably acquitted the guilty far more often than it convicted the innocent. Mr. Maitland tells us that in his researches in the English records from 1201 till the abolition of the ordeal in 1219—a period in which, as stated above (p. 387), it was in constant use—he has found but one instance in which it failed to clear the accused.[5] It is true that the cold-water ordeal was the one most freely resorted to, but the red-hot iron was also freely employed, and the one case of failure occurred in the water ordeal. At this distance of time it would be useless to frame a positive explanation of this, although bribery and collusion of course naturally suggest themselves in the notorious and almost universal corruption of the period. Contemporaries reconciled themselves to this as best they could, but while relying comfortably upon the inscrutable judgment of God, and the preservative power of

[1] Synod. Zabolcs can. 27 (Batthyani, Legg. Eccles. Hung. T. I. p. 439).

[2] Martene de Antiq. Eccl. Ritibus Lib. III. c. vii. Ordo 1.

[3] Statut. Wilhelmi Regis cap. 7 § 3 (Skene II. 4).

[4] Ibid. cap. 16.

[5] Maitland, Pleas of the Crown, I. 75.

contrition and confession, they were not without other solutions of the problem.

We have seen that in the judicial duel magic arts were popularly supposed to have power to control the interposition of God. This was likewise the case with the vulgar ordeals, and in addition a special power was attributed to the use or abuse of the holy chrism. The Council of Tours, in 813, informs us that it was generally believed that a criminal who drank the chrism or anointed himself with it could not be convicted by any ordeal.[1] So serious indeed was this considered that Charlemagne in 809 decreed that a priest giving out the chrism for this purpose should not only be degraded but should lose a hand—a law which long continued in force, nominally at least.[2] The belief was not ephemeral, for until the early part of the twelfth century a canon was carried through all the collections which speaks of the matter as a fact proved by experience.[3] The superstition probably died out towards the middle of the century when the number of sacraments was increased from three to seven, and the comparative importance of the chrism was thus diminished in the popular eyes. The belief that the judgment of God could be perverted or eluded by magic arts still continued, however, and precautions were commonly taken to prevent their use.[4] Holy water, moreover, was lavishly sprinkled on the materials employed in the ordeal and on the patient, and was given to him

[1] Nam criminosos eodem chrismate unctos aut potatos nequaquam ullo examine deprehendi posse a multis putatur.—C. Turonens. III. ann. 813 c. 20 (Harduin. IV. 1026).

[2] Capit. Car. Mag. II. ann. 809.—Capitul. Lib. III. c. 55.—Reginon. de Discip. Ecclesiæ I. 73.

[3] Reginon. *op. cit.* I. 72.—Burchardi Decret. IV. 80.—Ivon. Carnot. Decret. I. 274.

[4] Martene de Antiq. Ritibus Ecclesiæ Lib. III. c. vii. Ordo 8. So in a ninth century exorcism of the hot water—"et si culpabilis de hac causa est et aliqua maleficia aut per herbas peccatum suum tegere voluerit tua dextera evacuare dignetur."—Patetta, Archivio Giuridico, Vol. XLV.

to drink to prevent diabolic illusions by which it was imagined that the purposes of God could be defeated.[1]

Precautions also were taken to guard against processes by which, in the fire ordeals, it was believed that the human frame could be rendered incombustible, and for this object a widely prevailing custom required that for three days previous the hand should be wrapped up to guard against its being thus fortified.[2] The nature of these unguents may be guessed from a prescription given by Albertus Magnus, consisting of mallow and radish juice, white of egg, lime, and "psillus" seeds, the use of which he assures us will enable a man with impunity to enter the flames or to carry red-hot iron.[3] Doubtless reliance on some such expedients may partially explain the readiness with which the ordeal was undertaken.

CHAPTER XVII.

THE CHURCH AND THE ORDEAL.

The relation of the Church to the vulgar ordeals presents even a more complex question than that which has already been discussed of its connection with the judicial combat. The ordeals were less repugnant to its teachings and more completely dependent upon its ministrations, for while a duel might be fought without the aid of a priest the efficacy of an

[1] Martene, *loc. cit.* Ord. 10, 18.

[2] Du Cange, s. v. *Ferrum candens.*

[3] Experimentum mirabile quod facit homines ire in ignem sine læsione, vel portare ignem vel ferrum ignitum sine læsione in manu. Recipe succum bismalvæ et albumen ovi et semen psilli et calcem et pulveriza et confice; cum illo albumine ovi succum raphani commisce et ex hac confectione illinas corpus tuum et manum et dimitte siccari; et postea iterum illinas et post hoc poteris audacter sustinere ignem sine nocumento.—Alb. Mag. de Miraculis Mundi (Binterim, Denkwürdigkeiten der Christ-Katholischen Kirche, Bd. V. Th. iii. p. 70).

ordeal depended wholly upon the religious rites which gave it the sanction of a direct invocation of the Almighty.

We have seen above that the Church readily accepted the pagan practices of its Barbarian converts, and gave them fresh claim to confidence by surrounding them with the most impressive solemnities of the faith. Notwithstanding the worldly advantage derivable from this policy, there were some minds superior to the superstition or the cunning of their fellows. Even as early as the commencement of the sixth century, Avitus, Bishop of Vienne, remonstrated freely with Gundobald on account of the prominence given to the battle ordeal in the Burgundian code; and some three centuries later, St. Agobard, Archbishop of Lyons, attacked the whole system in two powerful treatises, which in many points display a breadth of view and clearness of reasoning far in advance of his age.[1] Shortly after this we find an echo of these arguments in some utterances of the papacy, such as the disapproval of the lot by Leo IV. (p. 353), of the duel by Nicholas I. (p. 207), and the more general condemnation by Stephen V. (p. 395), while on the other hand we have seen (p. 382) the ordeal adopted by Stephen VII. in the trial of his predecessor Formosus.

Whether the Holy See condemned or approved the judgment of God was a matter of the utmost indifference to the Church at large. The universal use of the ordeal, involving as it did the indispensable employment of priestly ministrations, shows sufficiently that no ecclesiastic hesitated to sanction it, and that practically it had the universal sympathy and support of the Church. Nor was this left to be merely a matter of inference, for the local churches had no scruple in advocating and prescribing it in the most authoritative manner. In 799 the Council of Salzburg ordered the ret-hot iron for the trial of witches and necromancers.[2] In 810, Ahyto, Bishop

[1] The "Liber adversus Legem Gundobadi" and "Liber contra Judicium Dei."

[2] Concil. Salisburg. I. can. ix. (Dalham Concil. Salisburg. p. 35).

of Basle, could suggest no other mode of determining doubtful cases of consanguinity between husband and wife.[1] In 853, the Synod of Soissons ordered Burchard, Bishop of Chartres, to prove his fitness for the episcopal office by undergoing the ordeal.[2] Hincmar, Archbishop of Reims, lent to it all the influence of his commanding talents and position; the Council of Mainz in 888, and that of Tribur near Mainz in 895, recommended it; that of Tours in 925 ordered it for the decision of a quarrel between two priests respecting certain tithes;[3] the synod of the province of Mainz in 1028 authorized the hot iron in a case of murder;[4] that of Elne in 1065 recognized it; that of Auch in 1068 confirmed its use; a penitential of the same period in Bohemia ordered the ordeal for those who pleaded ignorance when accused of marrying within the prohibited degrees;[5] Burckhardt, Bishop of Worms, whose collection of canons enjoyed high authority, in 1023 assisted at the Council of Selingenstadt, which directed its employment, and in his penitential he prescribes five years' penance for endeavoring by magic arts to escape conviction by it—a practice which, as we have seen, was not uncommon.[6] The synod of Gran, in 1099, decided that the ordeal of hot iron might be administered during Lent, except in cases involving the shedding of blood.[7] Moreover, we find St. Bernard alluding approvingly to the conviction and martyrdom of heretics by the cold-water process,[8] of which Guibert de Nogent gives us an instance wherein he aided the Bishop of Soissons in admin-

[1] Ahytonis Capitular. cap. xxi. (D'Achery I. 585).

[2] Capit. Carol. Calvi Tit. XI. c. iii. (Baluze).

[3] Concil. Turon. ann. 925 (Martene et Durand Thes. T. IV. pp. 72-3).

[4] Annalist. Saxo. ann. 1028.

[5] Höfler, Concilia Pragensia, p. xiv. Prag, 1862.

[6] Burchardi Decret. Lib. XIX. c. 5 (Migne's Patrologia CXL. p. 973).—Corrector Burchardi cap. 155 (Wasserschleben, Bussordnungen der abendländischen Kirche, p. 660).

[7] Batthyani, Legg. Eccles. Hung. II. 126.

[8] Examinati judicio aquæ mendaces inventi sunt . . . . aqua eos non suscipiente.—In Cantica, Sermon. 66 cap. 12.

istering it to two backsliders with complete success.[1] In 1157 the red-hot iron ordeal was prescribed by the Council of Reims for all persons accused of belonging to the fast-growing sect of the Cathari or Manichæans, whose progress was alarming the Church;[2] and in 1167 two heretics at Vezelai were tried by cold water in the presence of the Archbishop of Lyons and two bishops, when, singularly enough, they escaped.[3] In 1172 a learned clerk named Robert was involved in a debate with a knight on the delicate question whether the Eucharist became corrupted when voided from the body: he was accused as a heretic to the Bishop of Arras, who called in the Archbishop of Reims and numerous clerks to try him. Robert was so confident of his innocence that he offered to undergo the hot-iron ordeal, but his guilt was miraculously shown when burns appeared not only on the right hand that carried the iron, but also on the left hand, on both feet, both sides and on his chest and belly, wherefore he was promptly burned alive as a heretic.[4] Other cases, moreover, are related by Peter Cantor, in which good Catholics were successfully convicted of heresy in this manner, and one instance presents a curious view of the singular confusion which existed in judicial logic at the time. A poor fellow who professed the most entire orthodoxy, and against whom there was no proof, was ordered to carry the red-hot iron. This he refused unless the assembled bishops would prove that he could do so without incurring mortal sin by tempting God. This they were unable to accomplish, so all unpleasant doubts were settled by promptly having him burnt.[5] Even after the Lateran Council of 1215, some miracles related by Cæsarius of Heisterbach show that the conviction

[1] De Vita Sua Lib. III. cap. 18.

[2] Concil. Remens. ann. 1157, can. 1 (Martene Ampl. Coll. VII. 75).

[3] Hist. Vizeliacens. Lib. IV. (D'Achery Spicileg. II. 560).

[4] Godefridi S. Pantaleon. Annal. ann. 1172 (Freher et Struv. Rer. German. Scriptt. I. 340).

[5] Pet. Cantor. Verb. Abbreviat. cap. lxxviii. (Patrol. CCV. 230).

of heretics by the hot iron was regarded as a matter of course,[1] and a penitential of a somewhat later period complains that suspected heretics on trial had no other means of proving their orthodoxy or their conversion to the true faith. It also mentions a curious custom prevalent in some places that where there was doubt as to a man having died in grace, his friends had to prove his penitence by undergoing the cold-water ordeal before he was admitted to Christian sepulture.[2]

Prelates, moreover, were everywhere found granting charters containing the privilege of conducting trials in this manner. It was sometimes specially appropriated to members of the Church, who claimed it, under the name of *Lex Monachorum*, as a class privilege exempting them from being parties to the more barbarous and uncanonical wager of battle,[3] and in 1061 a charter of John, Bishop of Avranches, to the Abbot of Mont S. Michel, alludes to hot water and iron as the only mode of trying priests charged with offences of magnitude.[4] St. Ivo of Chartres, who denied the liability of churchmen to the ordeal, admitted that it could be properly used on laymen, and even pronounces its result to be beyond appeal.[5] Pope Calixtus II. in 1119 gave his sanction to it at the Council of Reims, and soon afterwards at the Council of Chartres he admitted the red-hot iron to decide a case of alleged violation of the right of asylum in a church.[6] About the same time

[1] Cæsar. Heisterbach. Dial. Mirac. Dist. III. c. xvi. xvii.

[2] Döllinger, Beiträge zur Sektengeschichte des Mittelalters, München, 1890, II. 621, 622.

[3] Theodericus Abbas Vice-Comitem adiit paratus aut calidi ferri judicio secundum legem monachorum per suum hominem probare, aut scuto et baculo secundum legem secularium deffendere.—Annal. Benedict. L. 57, No. 74, ann. 1036 (*ap.* Houard, Loix Anc. Franç. I. 267).

[4] Judicium ferri igniti et aquæ ferventis Abrincis portaretur, si clerici lapsi in culpam degradationis forte invenirentur.—Chart. Joan. Abrinc. (Patrolog. CXLVII. 266).

[5] Ivon. Carnot. Epist. ccxxxii. ccxlix. cclii.

[6] C. Remens. ann. 1119 (Harduin. VI. 1986).—Hildeberti Cenomanens. Epist. (D'Achery Spicileg. III. 456).

the learned priest, Honorius of Autun, specifies the benediction of the iron and water of the ordeal as part of the legitimate functions of his order;[1] and even Gratian, in 1151, hesitates to condemn the whole system, preferring to consider the canon of Stephen V. as prohibiting only the ordeals of hot water and iron.[2]

The Church, in fact, lent its most impressive ceremonies to enhance the effect on the popular mind of these trials. An *Ordo* or Ritual, of about the year 1100, informs us that when any one accused of theft or adultery or other crime refused to confess, the priest was to go to the church, put on his sacred vestments, except the chasuble, and then, holding the gospels and chrismatory, the chalice and paten and relics of saints, he from the vestibule summoned the people, while forbidding the accused, if guilty, and any of his accomplices to enter. At the same time he designated the spot in the vestibule where the fire was to be built to heat the caldron or the ploughshares, and sprinkled them all with holy water to prevent diabolical illusions. Then the accused entered. He was first required to forgive all offences as he hoped for pardon; he made confession of his sins and accepted penance, while the penitential psalms were sung customary for penitents on Ash Wednesday; if there was suspicion as to his faith he was made to swear on the altar his reliance on God rather than on the devil to manifest his innocence in the ordeal. Mass was then celebrated and communion was administered to him under the tremendous adjuration, "May the body and blood of our Lord Jesus Christ be unto thee a proof!" After this the priest led the

[1] Gemma Animæ, Lib. I. cap. 181. At least this is the only reading which will make the passage intelligible—"Horum officium est . . . vel nuptias vel arma, vel peras, vel baculos vel judicia ferre et aquas vel candelas . . . benedicere," where "ferre et aquas" is evidently corrupt for "ferri et aquæ."

[2] Hoc autem utrum ad omnia genera purgationis, an ad hæc duo tantum, quæ hic prohibita esse videntur, pertineat, non immerito dubitatur propter sacrificium zelotypiæ, et illud Gregorii.—C. 20, caus. II. q. V.

people to the spot where the trial was to take place. Prayers were uttered to God to render judgment, litanies and psalms were sung, the material of the ordeal, whether iron or hot or cold water, was blessed with an adjuration that it would be the means of rendering a just verdict, and the accused was exorcised with an adjuration to abandon the trial if he was conscious of guilt. Then the oath was administered to him, and he took hold of the glowing iron, or plunged his hand into the seething caldron, or was bound and cast into the water. Nothing was omitted that would add to the effectiveness of the prolonged ritual, and throughout it was in the hands of the priest; the secular tribunal effaced itself and abandoned the whole conduct of the affair to the Church.[1]

Gradually, however, the papacy ranged itself in opposition to the ordeal. After a silence of nearly two centuries, Alexander II., about 1070, denounced it as a popular invention, destitute of canonical authority, and forbade its use for ecclesiastics.[2] This was a claim which had already in the eighth century been advanced in England by Ecgbehrt, Archbishop of York, who piously declared that their oath on the cross was sufficient for acquittal, and that if guilty their punishment must be left to God.[3] About the year 1000, St. Abbo of Fleury revived this assertion of exemption,[4] and a century later St. Ivo of Chartres insisted on it.[5] As we have seen, these demands for clerical immunity were wholly disregarded, but they serve as a key to the motive of the papal opposition to the ordeal which developed itself so rapidly in the second half of the twelfth century. The Church had long sought, with little practical result, to emancipate the clergy from subjection to the secular law. This was one of the leading objects of the forgers of the Pseudo-Isidorian decretals; it had

[1] Ordo ad Frigidam Aquam, etc. (Pez, Thesaur. Anecd. T. II. P. II. p. 635).

[2] Ivon. Decret. X. 15.

[3] Dialog. Ecbert. Ebor. Interrog. III. (Thorpe, II. 88).

[4] Abbon. Floriac. Epist. viii.

[5] Ivon. Carnotens. Epist. lxxiv.

met with promising success at the time;[1] in the confusion of the tenth and eleventh centuries it had well-nigh been forgotten, but now it was revived and insisted on with a persistent energy which won the victory in the thirteenth century. When this point was gained and ecclesiastics were relieved from ordeals and duels, the next step was inevitably to extend the prohibition to the laity. The papal battle was really fought for the advantage of the clergy, but the clergy was ranged in opposition because the prospective benefit seemed inadequate to compensate for present loss. The local churches found in the administration of the ordeal a source of power and profit which naturally rendered them unwilling to abandon it at the papal mandate. Chartered privileges had accumulated around it, such as we have already seen in the case of the judicial duel, and these privileges were shared or held by prelates and churches and monasteries. Thus in 1148 we find Thibaut the Great of Champagne making over to the church of St. Mary Magdalen the exclusive right of administering the oaths required on such occasions in the town of Chateaudun;[2] and in 1182 the Vicomte de Béarn conferred on the Abbey de la Seauve the revenue arising from the marble basin used for the trial by boiling water at Gavarret.[3] In the statutes of King Coloman of Hungary, collected in 1099, there is a provision prohibiting the administration of the ordeal in the smaller churches, and reserving the privilege to the cathedral seats and other important establishments.[4]

According to a grant from Péregrin de Lavedan to the monastery of Saint-Pé, in Bigorre, the fee for administering the hot-water ordeal was five crowns, of which two were paid to the monastery, two to the cathedral at Tarbes, and one to the priest who blessed the water and stone.[5] By the laws of St.

[1] I have treated this matter in some detail in "Studies in Church History," pp. 69–74, 190 sqq.

[2] Du Cange, s. v. *Adramire.* [3] Revue Hist. de Droit, 1861, p. 478.

[4] Decret. Coloman. c. 11 (Batthyani T. I. p. 454).

[5] Lagrèze, Hist. du Droit dans les Pyrénées, p. 246.

Ladislas of Hungary, in 1092, the stipend of the officiating priest for the red-hot iron was double that which he received for the water ordeal;[1] in Bohemia the laws of Otto Premizlas in 1229 give the priest a fee of fourteen deniers for the latter.[2] How rigidly these rights were enforced is shown in a case related by Peter Cantor in the twelfth century. A man accused of crime was sentenced to undergo the ordeal of cold water. When stripped and bound and seated on the edge of the tank, the prosecutor withdrew the suit, but the official of the court refused to release the accused until he should pay fees amounting to nine livres and a half. A long wrangle ensued, until the defendant declared that he would pay nothing, but would rather undergo the ordeal, and, after establishing his innocence, would give fifty sols to the poor. He was accordingly thrown in and sank satisfactorily, but on being drawn out was met with a fresh claim from the officiating priest, of five sols, for blessing the water.[3]

As these fees were paid, sometimes on conviction and sometimes on acquittal, there was danger that, even without direct bribery, self-interest might affect the result. Thus by the acts of the Synod of Lillebonne, in 1080, a conviction by the hot-iron ordeal entailed a fine for the benefit of the bishop;[4] and it was apparently to prevent such influences that the Swedish code, compiled by Andreas Archbishop of Lunden early in the thirteenth century, made the successful party, whether the prosecutor or defendant, pay the fee to the officiating priest—a regulation sufficiently degrading to the sacerdotal character.[5] But besides these pecuniary advan-

[1] "Presbyter de ferro duas pensas et de aqua unam pensam accipiat." Synod. Zabolcs. ann. 1092 can. 27 (Batthyani I. 439). Another reading makes the fee equal for both (Ib. II. 101).

[2] Jura Primæva Moraviæ, Brunæ, 1781, p. 26.

[3] Pet. Cantor. Verb. Abbreviat. cap. xxiv.

[4] Orderic. Vital. Lib. v. cap. v.

[5] Leg. Scanicar. Lib. vii. cap. 99 (Ed. Thorsen, p. 171). There is another provision that in certain cases of murder the accused could not be

tages, the ordeal had a natural attraction to the clergy, as it afforded the means of awing the laity, by rendering the priest a special instrument of Divine justice, into whose hands every man felt that he was at any moment liable to fall; while, to the unworthy, its attractions were enhanced by the opportunities which it gave for the worst abuses. From the decretals of Alexander III. we learn authoritatively that the extortion of money from innocent persons by its instrumentality was a notorious fact[1]—a testimony confirmed by Ekkehardus Junior, who, a century earlier, makes the same accusation, and moreover inveighs bitterly against the priests who were wont to gratify the vilest instincts in stripping women for the purpose of exposing them to the ordeal of cold water.[2]

With all these influences, moral and material, to give to the local clergy a direct interest in the maintenance of the ordeal, it is no wonder that they battled resolutely for its preservation. In this, however, as in so many other details of ecclesiastical policy, centralization triumphed. When the papal authority reached its culminating point, a vigorous and sustained effort to abolish the whole system was made by the popes who occupied the pontifical throne from 1159 to 1227. Nothing can be more peremptory than the prohibition uttered by Alexander III.,[3] who sought moreover to enlist on his side the local churches by stigmatizing as an intolerable abuse the liability which in Sweden forced the highest prelates to sub-

compelled to undergo the ordeal of the red-hot ploughshares unless the accuser was supported by twelve conjurators, when, if the accused was successful each of the twelve was obliged to pay him three marks, and the same sum to the priest.—Ib. L. v. c. 58 (p. 140). It was scarcely intelligible why these ordeals were not allowed to be performed in any week in which there was a church-feast (Ibid. p. 170–1).

[1] Post. Concil. Lateran. P. II. cap. 3, 11.

[2] Holophernicos . . . . Presbyteros, qui animas hominum carissime appreciatas vendant; fœminas nudatas aquis immergi impudicis oculis curiose perspiciant, aut grandi se pretio redimere cogant.—De Casibus S. Galli cap. xiv.

[3] Alex. PP. III. Epist. 74.

mit to the red-hot iron ordeal.[1] About the same time we find the celebrated Peter Cantor earnestly urging that it was a sinful tempting of God and a most uncertain means of administering justice, which he enforces by numerous instances of innocent persons who, within his own knowledge, had been condemned by its means and put to death; and he declares that any priest exorcising the iron or water, or administering the oaths preliminary to the judicial duel, is guilty of mortal sin.[2] Somewhat earlier than this, Ekkehard Bishop of Munster took the same ground when he refused to his steward Richmar permission to undergo the red-hot iron ordeal in order to convert the Jew, Hermann of Cologne; it would be, he said, a tempting of God.[3] A different reason was given when Albero, a priest of Mercke near Cologne, offered to pass through fire to prove the orthodoxy of his teaching that the sacraments were vitiated in the hands of sinful priests, and his request was refused on the ground that skilful sorcery might thus lead to the success of a flagrant heresy.[4] In 1181, Lucius III. pronounced null and void the acquittal of a priest charged with homicide, who had undergone the water ordeal, and ordered him to prove his innocence with compurgators, giving as a reason that all such "peregrina judicia" were prohibited.[5] Even more severe was the blow administered by Innocent III. early in the thirteenth century. At Albenga, near Genoa, a man suspected of theft offered to prove his innocence by the red-hot iron, and agreed to be hanged if he should fail. The ordeal took place in the presence of the bishop and judge; the man's hand was burnt and after some consultation the bishop ordered him to be hanged. When Innocent heard of this he promptly had the bishop deprived of his see and a

[1] Alex. PP. III. Epist. (Harduin. VI. II. 1439).

[2] Pet. Cantor. Verb. Abbreviat. cap. lxxviii.

[3] Hermanni Opusc. de sua Conversione c. 5 (Migne, CLXX. 814).

[4] Anon. Libell. adversus Errores Alberonis (Martene Ampl. Coll. IX. 1265).

[5] C. 8 Extra v. xxxiv.

successor elected; his decision in this case was carried into the canon law as a precedent to be followed.[1] In 1210, moreover, when Bishop Henry of Strassburg was vigorously persecuting heresy and convicting heretics by the ordeal, one of them named Reinhold hurried to Rome and returned with a letter from Innocent forbidding it for the future; ordeals might be adjudged, he said, by the secular tribunals, but they were not admissible in ecclesiastical judgments.[2] Still more effective was his action when, under his impulsion, the Fourth Council of Lateran, in 1215, formally forbade the employment of any ecclesiastical ceremonies in such trials.[3] As the moral influence of the ordeal depended entirely upon its religious associations, a strict observance of this canon must speedily have swept the whole system into oblivion. Yet shortly after this we find the inquisitor Conrad of Marburg employing in Germany the red-hot iron as a means of condemning his unfortunate victims by wholesale, and the chronicler relates that, whether innocent or guilty, few escaped the test.[4] The canon of Lateran, however, was actively followed up by the papal legates, and the system may consequently be considered to have fairly entered on its decline.

So far as the Church was concerned its condemnation was irrevocable. By this time the papacy had become the supreme and unquestioned legislator. The compilation of papal decrees known as the Decretals of Gregory IX., issued in 1234, was everywhere accepted as the "new law" of binding force, and in it the compiler, St. Ramon de Peñafort, had sedulously

[1] Can. 10 Extra v. 31.

[2] Innoc. PP. III. Regest. XIV. 138.—Yet abundant miracles in Strassburg testified to the divine favor in these trials.—Cæsar. Hiesterbac. Dist. III. c. 16, 17.

[3] Nec . . . . quisquam purgationi aquæ ferventis vel frigidæ, seu ferri candentis ritum cujuslibet benedictionis seu consecrationis impendat.—Concil Lateran. can. 18. In 1227, the Council of Trèves repeated the prohibition, but only applied it to the red-hot iron ordeal. "Item. nullus sacerdos candens ferrum benedicat."—Concil. Trevirens. ann. 1227, cap. ix.

[4] Trithem. Chron. Hirsaug. ann. 1215.

inserted the prohibitions so repeatedly issued during the preceding three-quarters of a century. These prohibitions were no longer construed as limited to ecclesiastics; the whole system was condemned. St. Ramon himself in his *Summa*, which had immense and lasting authority, had no hesitation in denouncing all ordeals as an accursed invention of the devil.[1] His contemporary, Alexander Hales, whose reputation as a theologian stood unrivalled, after presenting the arguments on both sides, concludes that they are wholly to be rejected.[2] Soon afterwards Cardinal Henry of Susa, the leading canonist of his day, gave a severer blow by proving that as ordeals are illegal all sentences rendered by their means are null and void.[3] Still the practice was hard to suppress, for at the end of the century we find John of Freiburg denouncing it as forbidden and accursed; bishops and abbots permitting ordeals in their courts are guilty of mortal sin, and preachers should denounce them from their pulpits with all due modesty.[4] This shows that the spiritual lords were still deaf to the voice of the papacy, but the principle was settled and in 1317 Astesanus, whose authority was of the highest, treats the whole system of duels and ordeals as mere appeals to chance, having no warrant in divine law and forbidden by the Church.[5] This attitude was consistently preserved, and Gregory XI. in 1374, when condemning the Sachsenspiegel, enumerated, among other objectionable features, its provisions of this nature as contrary to the canon law and a tempting of God.[6]

[1] Vulgaris purgatio est quæ a vulgo est inventa, ut ferri candentis, aquæ ferventis vel frigidæ, panis vel casei, monomachiæ id est duelli et ceteræ hujusmodi: sed ista hodie in totum reprobata est et maledicta, tum quia inventa est a diabolo fabricante.—S. Raymundi Summæ Lib. III. Tit. xxxi. § 1.

[2] Ergo hujusmodi judicia sunt penitus reprobanda et purgatio per talia.—Alex. de Ales Summæ P. III. Q. xlvi. Membr. 3.

[3] Hostiensis Aureæ Summæ Lib. V. *De Purg. Vulg.* § 3.

[4] Joh. Friburgens. Summæ Confessorum Lib. III. Tit. xxxi. Q. 2, 3.

[5] Astesani de Ast Summæ de Casibus Conscientiæ, P. I. Lib. I. Tit. xiv.

[6] Sachsenspiegel, ed. Ludovici, 1720, p. 619.

CHAPTER XVIII.

REPRESSIVE SECULAR LEGISLATION.

ENLIGHTENED legislators were not slow in seconding the efforts of the papacy. Perhaps the earliest instance of secular legislation directed against the ordeal, except some charters granted to communes, is an edict of Philip Augustus in 1200, bestowing certain privileges on the scholars of the University of Paris, by which he ordered that a citizen accused of assaulting a student shall not be allowed to defend himself either by the duel or the water ordeal.[1] In England, a rescript of Henry III., dated January 27, 1219, directs the judges then starting on their circuits to employ other modes of proof—"seeing that the judgment of fire and water is forbidden by the Church of Rome."[2] A few charters and confirmations, dated some years subsequently, allude to the privilege of administering it; but Matthew of Westminster, when enumerating, under date of 1250, the remarkable events of the half century, specifies its abrogation as one of the occurrences to be noted,[3] and we may conclude that thenceforth it was practically abandoned throughout the kingdom. This is confirmed by the fact that Bracton, whose treatise was written a few years later, refers only to the wager of battle as a legal procedure, and, when alluding to other forms, speaks of them as things of the past. About the same time, Alexander II. of Scotland forbade its use in cases of theft.[4] Nearly con-

[1] Fontanon, IV. 942. [2] Rymer, Fœd. I. 228.

[3] Prohibitum est judicium quod fieri consuevit per ignem et per aquam.—Mat. Westmon. ann. 1250.

[4] De cetero non fiat judicium per aquam vel ferrum, ut consuetum fuit antiquis temporibus.—Statut. Alex. II. cap. 7 § 3. There is some obscurity

temporary was the Neapolitan Code, promulgated in 1231, by authority of the Emperor Frederic II., in which he not only prohibits the use of the ordeal in all cases, but ridicules, in a very curious passage, the folly of those who could place confidence in it.[1] We may conclude, however, that this was not effectual in eradicating it, for, fifty years later, Charles of Anjou found it necessary to repeat the injunction.[2] About the same time, Waldemar II. of Denmark, Hako Hakonsen of Iceland and Norway, and soon afterwards Birger Jarl of Sweden, followed the example.[3] In Frisia we learn that the inhabitants still refused to obey the papal mandates, and insisted on retaining the red-hot iron, a contumacy which Emo, the contemporary Abbot of Wittewerum, cites as one of the causes of the terrible inundation of 1219;[4] though a century later the Laws of Upstallesboom show that ordeals of all

about this provision owing to variants in the MSS., but Mr. Neilson holds (Trial by Combat, p. 113) that there can be little doubt that it abolished the ordeal wholly.

[1] Leges quæ a quibusdam simplicibus sunt dictæ paribiles . . . . præsentis nostri nominis sanctionis edicto in perpetuum inhibentes omnibus regni nostri judicibus, ut nullus ipsas leges paribiles, quæ abscensæ a veritate deberent potius nuncupari, aliquibus fidelibus nostris indicet . . . . Eorum etinim sensum non tam corrigendum duximus quam ridendum, qui naturalem candentis ferri calorem tepescere, imo (quod est stultius) frigescere, nulla justa causa superveniente, confidunt; aut qui reum criminis constitutum, ob conscientiam læsam tantum asserunt ab aquæ frigidæ elemento non recipi, quem submergi potius aeris competentis retentio non permittit.—Constit. Sicular. Lib. II. Tit. 31. This last clause would seem to allude to some artifice of the operators by which the accused was prevented from sinking in the cold-water ordeal when a conviction was desired.

This common sense view of the miracles so generally believed is the more significant as coming from Frederic, who, a few years previously, was ferociously vindicating with fire and sword the sanctity of the Holy Seamless Coat against the aspersions of unbelieving heretics. See his Constitutions of 1221 in Goldastus, Const. Imp. I. 293–4.

[2] Statut. MSS. Caroli I. cap. xxii. (Du Cange, s. v. *Lex Parib.*).

[3] Königswarter, *op. cit.* p. 176.

[4] Emon. Chron. ann. 1219 (Matthæi Analect. III. 72).

kinds had fallen into desuetude.[1] In France, we find no formal abrogation promulgated; but the contempt into which the system had fallen is abundantly proved by the fact that in the ordinances and books of practice issued during the latter half of the century, such as the *Établissements* of St. Louis, the *Conseil* of Pierre de Fontaines, the *Coutumes du Beauvoisis* of Beaumanoir, and the *Livres de Jostice et de Plet*, its existence is not recognized even by a prohibitory allusion, the judicial duel thenceforward monopolizing the province of irregular evidence. Indeed, a Latin version of the Coutumier of Normandy, dating about the middle of the thirteenth century, or a little earlier, speaks of it as a mode of proof formerly employed in cases where one of the parties was a woman who could find no champion to undergo the wager of battle, adding that it had been forbidden by the Church, and that such cases were then determined by inquests.[2]

Germany was more tardy in yielding to the mandates of the Church. The Teutonic knights who wielded their proselyting swords in the Marches of Prussia introduced the ordeal among other Christian observances, and in 1222 Honorius III., at the prayer of the Livonian converts, promulgated a decree by which he strictly interdicted its use for the future.[3] Even in 1279 we find the Council of Buda, and in 1298 that of Wurzburg, obliged to repeat the prohibition uttered by that of Lateran.[4] These commands enjoyed little respect, and the

[1] Issued in 1323.

[2] Cod. Leg. Norman. P. II. c. X. §§ 2, 3 (Ludewig, Reliq. Mictorum. VII. 292). It is a little singular that the same phrase is retained in the authentic copy of the Coutumier, in force until the close of the sixteenth century.—Anc. Cout. de Normandie, c. 77 (Bourdot de Richebourg. IV. 32).

[3] C. iii. Extra, Lib. v. Tit. xxxv.—As embodied in the Decretals of Gregory IX. this canon omits a clause indicating how great was the detestation of the people for the ordeal thus imposed on them—"quare conversis et convertendis scandalum incutiunt et terrorem."—Quint. Compilat. Honorii III. Lib. IV. Tit. xiv.

[4] Batthyani, Legg. Eccles. Hung. T. II. p. 436.—Hartzheim, IV. 27.

independent spirit of the Empire still refused obedience to the commands of the Church. It may probably be to Germany that Roger Bacon refers, about this time, when he speaks of the ordeals of red-hot iron and cold water being still in use by authority of the Church, and admits that the exorcisms employed in them by the priests may have virtue in the detection of guilt and acquittal of innocence.[1] Even in the fourteenth century the ancestral customs were preserved in full vigor as regular modes of procedure in a manual of legal practice still extant. An accusation of homicide could be disproved only by the judicial combat, while in other felonies a man of bad repute had no other means of escape than by undergoing the trial by hot water or iron.[2]

In Aragon, Don Jayme I. included the ordeal in his prohibition of the duel when framing laws for his Minorcan conquest in 1230, and that this was his settled policy is seen by a similar clause of the fuero of Huesca in 1247.[3] In Castile and Leon, the charter of Medina de Pomar, granted in 1219 by Fernando III., provides that there shall be no trial by the hot-water ordeal,[4] and that of Treviño in 1254, by Alfonso X., forbids all ordeals.[5] Still the Council of Palencia, in 1322, was obliged to threaten with excommunication all concerned in administering the ordeal of fire or of water,[6] which proves how little had been accomplished by the enlightened code of the "Partidas," issued about 1260 by Alfonso the Wise. In this the burden of proof is expressly thrown upon the com-

[1] Rogeri Bacon Epist. de Secretis Operibus Artis c. ii. (M. R. Series I. 526).

[2] Richstich Landrecht, cap. LII. The same provisions are to be found in a French version of the Speculum Suevicum, probably made towards the close of the fourteenth century for the use of the western provinces of the Empire.—Miroir de Souabe, P. I. c. xlviii. (Éd. Matile, Neufchatel, 1843).

[3] Villaneuva, Viage Literario, XXII. 288.—Du Cange, s. vv. *Ferrum candens*, *Batalia*.

[4] Coleccion de Cédulas, etc., Madrid, 1830, Tom. V. p. 142.

[5] Memorial Histórico Español, Madrid, 1850, Tom. I. p. 47.

[6] Concil. Palentin. ann. 1322, can. xxvi.

plainant, and no negative evidence is demanded of the defendant, who is specially exempted from the necessity of producing it;[1] and although in obedience to the chivalrous spirit of the age, the battle ordeal is not abolished, yet it is so limited as to be practically a dead letter, while no other form of negative proof is even alluded to.

In Italy, even in the middle of the fifteenth century St. Antonino of Florence considers it necessary, in his instructions to confessors, to tell them that a judge who prescribes the combat or the red-hot iron commits mortal sin;[2] and Angelo da Chiavasco, who died in 1485, requires confessors to inquire of penitents whether they have ordered or accepted the hot-iron ordeal.[3] Even as late as 1599 G. Ferretti tells us that in some districts of Naples, inhabited by Epirotes, husbands who suspect their wives of adultery force them to prove their innocence by the ordeal of red-hot iron or boiling water.[4]

Although the ordeal was thus removed from the admitted jurisprudence of Europe, the principles of faith which had given it vitality were too deeply implanted in the popular mind to be at once eradicated, and accordingly, as we have seen above, instances of its employment continued occasionally for several centuries to disgrace the tribunals. The ordeal of battle, indeed, as shown in the preceding essay, was not legally abrogated until long afterward; and the longevity of the popular belief, upon which the whole system was founded, may be gathered from a remark of Sir William Staundford, a learned judge and respectable legal authority, who, in 1557, expresses the same confident expectation of Divine interference

[1] Non es tenuda la parte de probar lo que niega porque non lo podrie facer.—Las Siete Partidas, P. III. Tit. xiv. l. 1.

[2] S. Antonini Confessionale.

[3] Angeli de Clavasio Summa Angelica s. v. *Interrogationes*. The contemporary Baptista de Saulis speaks of ordeals in the present tense when saying that all concerned in them are guilty of mortal sin.—Summa Rosella, s. v. *Purgatio*.

[4] Patetta, Le Ordalie, p. 450.

which had animated Hincmar or Poppo. After stating that in an accusation of felony, unsupported by evidence, the defendant had a right to wager his battle, he proceeds: "Because in that the appellant demands judgment of death against the appellee, it is more reasonable that he should hazard his life with the defendant for the trial of it, than to put it on the country . . . . and to leave it to God, to whom all things are open, to give the verdict in such case, *scilicet*, by attributing the victory or vanquishment to the one party or the other, as it pleaseth Him."[1] Nearly about the same time, Ciruelo, who for thirty years was Inquisitor at Saragossa, alludes to cases in which he had personally known of its employment, thus showing that it was in popular use, even though not prescribed by the law, in Spain during the middle of the sixteenth century.[2] In Germany not long before the learned Aventinus showed plainly that the existing incredulity which treated all such reliance on God as insanity was much less to his taste than the pious trust which through ages of faith had led princes and prelates to place their hope in God and invoke him with all the solemnities of religion to decide where human wisdom was at fault.[3]

While the prohibitions uttered by the papacy had undoubtedly much to do in influencing monarchs to abolish the ordeal, there were other causes of scarcely less weight working to the same end. The revival of the Roman law in the twelfth and thirteenth centuries and the introduction of torture as an unfailing expedient in doubtful cases did much to influence the secular tribunals against all ordeals. So, also, a powerful assistant must be recognized in the rise of the communes, whose sturdy common sense not infrequently rejected its absurdity. These influences, however, have been discussed at

[1] Plees del Corone, chap. xv. (quoted in 1 Barnewall & Alderson, 433).

[2] Ciruelo, Reprovacion de las Supersticiones. P. II. cap. vii. Salamanca, 1539.

[3] Aventini Annal. Boior. Lib. IV. c. xiv. n. 31.

some length in the previous essay, and it is scarce worth while to repeat what has there been said, except to add that, as a recognized legal procedure, the ordeal succumbed with a less prolonged struggle than the single combat.

Yet no definite period can be assigned to the disappearance in any country of the appeals to Heaven handed down from our ancestors in the illimitable past. We have seen above how certain forms of the ordeal, such as bier-right and the trial by cold water, have lingered virtually to our own times, though long since displaced from the statute-book; and we should err if we deemed the prohibition of the system by law-givers to be either the effect or the cause of a change in the constitution of the human mind. The mysterious attraction of the unknown, the striving for the unattainable, the yearning to connect our mortal nature with some supernal power—all these mixed motives assist in maintaining the superstitions which we have thus passed in review. Even though the external manifestations may have been swept away, the potent agencies which vivified them have remained, not perhaps less active because they work more secretly. One generation of follies after another, strangely affiliated, waits on the successive descendants of man, and perpetuates in another shape the superstition which seemed to be eradicated. In its most vulgar and abhorrent form, we recognize it in the fearful epidemic of sorcery and witchcraft which afflicted the sixteenth and seventeenth centuries; sublimed to the verge of heaven, we see it reappear in the seraphic theories of Quietism; descending again towards earth, it stimulates the mad vagaries of the Convulsionnaires. In a different guise, it leads the refined scepticism of the eighteenth century to a belief in the supernatural powers of the divining rod, which could not only trace out hidden springs and deep-buried mines, but could also discover crime, and follow the malefactor through all the doublings of his cunning flight.[1] Even at the present day, as

[1] When, in 1692, Jacques Aymar attracted public attention to the miracles of the diving-rod, he was called to Lyons to assist the police in dis-

various references in the preceding pages sufficiently attest, there is a lurking undercurrent of superstition which occasionally rises into view and shows that we are not yet exempt from the weakness of the past. Each age has its own sins and follies to answer for—happiest that which best succeeds in hiding them, for it can scarce do more. Here, at the close of the nineteenth century, when the triumph of human intelligence over the forces of nature, stimulating the progress of material prosperity, has deluded us into sacrificing our psychical to our intellectual being—even here the duality of our nature reasserts itself, and in the crudity of Mormonism and in the fantastic mysteries of spiritism we see a protest against the despotism of mere reason. If we wonder at these perversions of our noblest attributes, we must remember that the intensity of the reaction measures the original strain, and in the insanities of the day we thus may learn how utterly we have forgotten the Divine warning, "Man shall not live by bread alone!"

covering the perpetrators of a mysterious murder, which had completely baffled the agents of justice. Aided by his rod, he traced the criminals, by land and water, from Lyons to Beaucaire, where he found in prison a man whom he declared to be a participant, and who finally confessed the crime. In 1703 Marshal Montrevel and the intendant Baville made use of Aymar to discover Calvinists, of whom numbers were condemned on the strength of his revelations (Patetta, Le Ordalie, p. 33). Aymar was at length proved to be merely a clever charlatan, but the mania to which he gave rise lasted through the eighteenth century, and nearly at its close his wonders were rivalled by a brother sharper, Campetti. The belief in the powers of the divining-rod has not yet died out, and it is frequently used to discover oil wells, springs, mines, etc.

A good account of Aymar's career and the discussion to which it gave rise may be found in Prof. Rubio y Diaz's "Estudios sobre la Evocacion de los Espiritus," Cadiz, 1860, pp. 116–28.

IV.

TORTURE.

CHAPTER I.

TORTURE IN EGYPT AND ASIA.

The preceding essays have traced the development of sacramental purgation and of the ordeal as resources devised by human ingenuity and credulity when called upon to decide questions too intricate for the impatient intellect of a rude and semi-barbarous age. There was another mode, however, of attaining the same object which has received the sanction of the wisest lawgivers during the greater part of the world's history, and our survey of man's devious wanderings in the search of truth would be incomplete without glancing at the subject of the judicial use of torture. The ordeal and torture, in fact, are virtually substitutes for each other. It will be seen that they have rarely co-existed, and that, as a general rule, the legislation which depended on the one rejected the other.

In the early stages of society, the judge or the pleader whose faith does not lead him to rely upon an appeal to God naturally seeks to extort from the reluctant witness a statement of what he might desire to conceal, or from the presumed criminal a confession of his guilt. To accomplish this, the readiest means would seem to be the infliction of pain, to escape from

which the witness would sacrifice his friends, and the accused would submit to the penalty of his crime. The means of administering graduated and effectual torment would thus be sought for, and the rules for its application would in time be developed into a regular system, forming part of the recognized principles of jurisprudence.

In the earliest civilization, that of Egypt, it would seem as though torture was too opposed to the whole theory of judicial proceedings to be employed, if we are to believe the description which Diodorus Siculus gives of the solemn and mysterious tribunals, where written pleadings alone were allowed, lest the judges should be swayed by the eloquence of the human voice, and where the verdict was announced, in the unbroken silence, by the presiding judge touching the successful suitor with an image of the Goddess of Truth.[1] Yet a papyrus recently interpreted gives us a judicial record of a trial, in the reign of Rameses IX. of the XXth Dynasty (circa 1200 B. C.), of the robbers of the tomb of the Pharaoh Sebakemsauf, and this shows how the accused, after confession, were tortured for confirmation, first by scourging and then by squeezing the hands and feet, showing that, sometimes at least, this mode of ascertaining the truth was employed.[2]

Among the Semitic races we find torture used as a regular judicial process by the Assyrians,[3] though the Mosaic jurisprudence is free from any indication that the Hebrew lawdispensers regarded it as a legitimate expedient. Earnest

[1] Diod. Sicul. I. lxxv.—Sir Gardiner Wilkinson (Ancient Egyptians, Vol. II.) figures several of these little images.

[2] See the translation of the Amherst Papyrus by Chabas, Mélanges Égyptologiques, III.e Serie, T. II. p. 17 (Sept. 1873). The interpretation of the groups relating to the hands and feet is conjectural, but they unquestionably signify some kind of violence. M. Chabas qualifies this passage as highly important, being the first evidence that has reached us of the judicial use of torture in Egypt. The question has been a debated one, but the previous evidence adduced was altogether inconclusive.

[3] Lenormant, Man. de l'Hist. Ancienne de l'Orient, II. 141.

advocates of the torture system, in the eighteenth century, however, did not hesitate to adduce the ordeal of the bitter water of jealousy as a torture which justified the employment in modern times of the rack and strappado.

In the earliest Aryan records, so far as we can judge from the fragments remaining of the Zoroastrian law, torture had no recognized place. Astyages was rather a Mede than a Persian, and therefore no conclusion can be drawn from his readiness to employ it when he sought to extort the truth from unwilling witnesses, as related by Herodotus;[1] but the savage punishments which Darius boasts of inflicting upon the rival pretenders to his throne[2] presuppose a readiness to resort to the most violent means of intimidation, which could scarcely fail to include torture as an extra-judicial means of investigation when milder methods failed.

To the other great branch of the Aryan stock which founded the Indian civilization, torture would likewise seem to have been unknown as a legitimate resource; at least it has left no trace of its existence in the elaborate provisions of the Hindu law as handed down to us for nearly three thousand years. In the Institutes of Manu there are very minute directions as to evidence, the testimony preferred being that of witnesses, whose comparative credibility is very carefully discussed, and when such evidence is not attainable, the parties, as we have seen above, are ordered to be sworn or tried by the ordeal. These principles have been transmitted unchanged to the present day.[3]

In China the juristic principles in force would seem to allow no place for the use of torture (*ante*, p. 251), though doubtless

[1] Herod. I. 116.

[2] Behistun Inscription, col. II. 25–6 (Records of the Past, VII. 98–99). It is worthy of remark that this Medic version of the Inscription is more circumstantial as to these inflictions than the Persian text translated by Rawlinson (Records I. 118–19).

[3] Manu, Bk. VIII.—Institutes of Vishnu, VI. 23, VIII. IX.—Ayeen Akbery, Tit. Beyhar, Vol. II. p. 494 —Halhed's Code of Gentoo Laws, chap. xviii.

it may be occasionally resorted to as an extra-judicial expedient. In Japan it still retains its place in the criminal codes, though we may well believe the assertion that practically its use has been discarded in the progress of modern enlightenment. As to its former employment, however, the directions are very explicit. In the milder form of scourging it might be used in all preliminary examinations. Where reasonable moral certainty existed of guilt in serious and capital crimes, the severer inflictions, by fire, by various mechanical devices, by deprivation of food and sleep or by exposure to venomous reptiles, could be invoked to extort confession, the accused being notified in advance that it would be used if he persisted in asserting his innocence, and the official ordering it being held personally responsible for its undue or improper employment.[1]

CHAPTER II.

GREECE AND ROME.

The absence of torture from the codes of the elder Aryan races is not to be attributed to any inherent objection to its use, but rather to the employment of the ordeal, which in all ages formed part of their jurisprudence, and served as an unfailing resort in all doubtful cases. When we turn to the Aryans who established themselves in Europe and abandoned the ancestral custom of the ordeal, we find it at once replaced by the use of torture. Thus in Greece torture was thoroughly understood and permanently established. The oligarchical and aristocratic tendencies, however, which were so strongly developed in the Hellenic commonwealths, imposed upon it a limitation characteristic of the pride and self-respect of the governing order. As a general rule, no freeman could be tortured. Even freed-

[1] Albany Law Journal, 1879.

men enjoyed an exemption, and it was reserved for the unfortunate class of slaves, and for strangers who formed no part of the body politic. Yet there were exceptions, as among the Rhodians, whose laws authorized the torture of free citizens; and in other states it was occasionally resorted to, in the case of flagrant political offences; while the people, acting in their supreme and irresponsible authority, could at any time decree its application to any one irrespective of privilege. Thus, when Hipparchus was assassinated by Harmodius, Aristogiton was tortured to obtain a revelation of the plot, and several similar proceedings are related by Valerius Maximus as occurring among the Hellenic nations.[1] The inhuman torments inflicted on Philotas, son of Parmenio, when accused of conspiracy against Alexander, show how little real protection existed when the safety of a despot was in question; and illustrations of torture decreed by the people are to be seen in the proceedings relative to the mutilation of the statues of Hermes, and in the proposition, on the trial of Phocion, to put him, the most eminent citizen of Athens, on the rack.

In a population consisting largely of slaves, who were generally of the same race as their masters, often men of education and intelligence and employed in positions of confidence, legal proceedings must frequently have turned upon their evidence, in both civil and criminal cases. Their evidence, however, was inadmissible, except when given under torture, and then, by a singular confusion of logic, it was estimated as the most convincing kind of testimony. Consequently, the torturing of slaves formed an important portion of the administration of Athenian justice. Either party to a suit might offer his slaves to the torturer or demand those of his opponent, and a refusal to produce them was regarded as seriously compromising. When both parties tendered their slaves, the judge decided as to which of them should be received. Even without bringing a suit into court, disputants could have their

[1] Lib. III. cap. iii.

slaves tortured for evidence with which to effect an amicable settlement.

In formal litigation, the defeated suitor paid whatever damages his adversary's slaves might have undergone at the hands of the professional torturer, who, as an expert in such matters, was empowered to assess the amount of depreciation that they had sustained. It affords a curious commentary on the high estimation in which such testimony was held to observe that, when a man's slaves had testified against him on the rack, they were not protected from his subsequent vengeance, which might be exercised upon them without restriction.

As the laws of Greece passed away, leaving few traces on the institutions of other races, save on those of Rome, it will suffice to add that the principal modes in which torture was sanctioned by them were the wheel, the ladder or rack, the comb with sharp teeth, the low vault, in which the unfortunate patient was thrust and bent double, the burning tiles, the heavy hogskin whip, and the injection of vinegar into the nostrils.[1]

In the earlier days of Rome, the general principles governing the administration of torture were the same as in Greece. Under the Republic, the free citizen was not liable to it, and the evidence of slaves was not received without it. With the progress of despotism, however, the safeguards which surrounded the freeman were broken down, and autocratic emperors had little scruple in sending their subjects to the rack.

Even as early as the second Triumvirate, a prætor named

[1] Aristophanes (*Ranæ*, 617) recapitulates most of the processes in vogue.

Aiachos. καὶ πῶς βασανίζω ;

Xanthias. πάντα τρόπον, ἐν κλίμακι
δήσας, κρεμάσας, ὑστριχίδι μαστιγῶν, δέρων,
στρεβλῶν, ἔτι δ' εἰς τὰς ῥῖνας ὄξος ἐγχέων,
πλίνθους ἐπιτιθείς, παντα τἄλλα.

The best summary I have met with of the Athenian laws of torture is in Eschbach's "Introduction à l'Étude du Droit," § 268.

Q. Gallius, in saluting Octavius, chanced to have a double tablet under his toga. To the timid imagination of the future emperor, the angles of the tablet, outlined under the garment, presented the semblance of a sword, and he fancied Gallius to be the instrument of a conspiracy against his life. Dissembling his fears for the moment, he soon caused the unlucky prætor to be seized while presiding at his own tribunal, and, after torturing him like a slave without extracting a confession, put him to death.[1]

The incident was ominous of the future, when all the powers of the state were concentrated in the august person of the emperor. He was the representative and embodiment of the limitless sovereignty of the people, whose irresponsible authority was transferred to him. The rules and formularies which had regulated the exercise of power, so long as it belonged to the people, were feeble barriers to the passions and fears of Cæsarism. Accordingly, a principle soon became engrafted in Roman jurisprudence that, in all cases of *crimen majestatis*, or high treason, the free citizen could be tortured. In striking at the ruler he had forfeited all rights, and the safety of the state, as embodied in the emperor, was to be preserved at every sacrifice.

The emperors were not long in discovering and exercising their power. When the plot of Sejanus was discovered, the historian relates that Tiberius abandoned himself so entirely to the task of examining by torture the suspected accomplices of the conspiracy, that when an old Rhodian friend, who had come to visit him on a special invitation, was announced to him, the preoccupied tyrant absently ordered him to be placed on the rack, and on discovering the blunder had him quietly put to death, to silence all complaints. The shuddering inhabitants pointed out a spot in Capri where he indulged in these terrible pursuits, and where the miserable victims of his wrath were cast into the sea before his eyes, after having ex-

[1] Sueton. August. xxii.

hausted his ingenuity in exquisite torments.[1] When the master of the world took this fearful delight in human agony, it may readily be imagined that law and custom offered little protection to the defenceless subject, and Tiberius was not the only one who relished these inhuman pleasures. The half-insane Caligula found that the torture of criminals by the side of his dinner-table lent a keener zest to his revels, and even the timid and the beastly Claudius made it a point to be present on such occasions.[2]

Under the stimulus of such hideous appetites, capricious and irresponsible cruelty was able to give a wide extension to the law of treason. If victims were wanted to gratify the whims of the monarch or the hate of his creatures, it was easy to find an offender or to make a crime. Under Tiberius, a citizen removed the head from a statue of Augustus, intending to replace it with another. Interrogated before the Senate, he prevaricated, and was promptly put to the torture. Encouraged by this, the most fanciful interpretation was given to violations of the respect assumed to be due to the late emperor. To undress one's self or to beat a slave near his image; to carry into a latrine or a house of ill fame a coin or a ring impressed with his sacred features; to criticize any act or word of his became a treasonable offence; and finally an unlucky wight was actually put to death for allowing the slaves on his farm to pay him honors on the anniversary which had been sacred to Augustus.[3]

So, when it suited the waning strength of paganism to wreak its vengeance for anticipated defeat upon the rising energy of Christianity, it was easy to include the new religion in the convenient charge of treason, and to expose its votaries to all the horrors of ingenious cruelty. If Nero desired to divert from himself the odium of the conflagration of Rome, he could turn upon the Christians, and by well-directed tortures obtain con-

[1] Sueton. Tiberii lxii.

[2] Ibid. Caii xxxii.—Claud. xxxiv.

[3] Ibid. Tiber. lviii.

fessions involving the whole sect, thus giving to the populace the diversion of a persecution on a scale until then unknown, besides providing for himself the new sensation of the human torches whose frightful agonies illuminated his unearthly orgies.[1] Diocletian even formally promulgated in an edict the rule that all professors of the hated religion should be deprived of the privileges of birth and station, and be subject to the application of torture.[2] The indiscriminate cruelty to which the Christians were thus exposed without defence, at the hands of those inflamed against them by all evil passions, may, perhaps, have been exaggerated by the ecclesiastical historians, but that frightful excesses were perpetrated under sanction of law cannot be doubted by any one who has traced, even in comparatively recent times and among Christian nations, the progress of political and religious persecution.[3]

The torture of freemen accused of crimes against the state or the sacred person of the emperor thus became an admitted principle of Roman law. In his account of the conspiracy of Piso, under Nero, Tacitus alludes to it as a matter of course, and in describing the unexampled endurance of Epicharis, a freedwoman, who underwent the most fearful torments without compromising those who possessed little claim upon her forbearance, the annalist indignantly compares her fortitude with the cowardice of noble Romans, who be-

[1] Tacit. Annal. xv. xliv.

[2] Lactant. de Mortib. Persecut. cap. xiii.

[3] Tormentorum genera inaudita excogitabantur (Ibid. cap. xv.).—When the Christians were accused of an attempt to burn the imperial palace, Diocletian "ira inflammatus, excarnificari omnes suos protinus præcipit. Sedebat ipse atque innocentes igne torrebat" (Ibid. cap. xiv.).—Lactantius, or whoever was the real author of the tract, addresses the priest Donatus to whom it is inscribed: "Novies etiam tormentis cruciatibusque variis subjectus, novies adversarium gloriosa confessione vicisti. . . . . Nihil adversus te verbera, nihil ungulæ, nihil ignis, nihil ferrum, nihil varia tormentorum genera valuerunt" (Ibid. cap. xvi.). Ample details may be found in Eusebius, Hist. Eccles. Lib. v. c. i, vi. 39, 41, viii. passim, Lib. Martyrum; and in Cyprian, Epist. x. (Ed. Oxon. 1682).

trayed their nearest relatives and dearest friends at the mere sight of the torture chamber.[1]

Under these limits, the freeman's privilege of exemption was carefully guarded, at least in theory. A slave while claiming freedom, or a man claimed as a slave, could not be exposed to torture;[2] and even if a slave, when about to be tortured, endeavored to escape by asserting his freedom, it was necessary to prove his servile condition before proceeding with the legal torments.[3] In practice, however, these privileges were continually infringed, and numerous edicts of the emperors were directed to repressing the abuses which constantly occurred. Thus we find Diocletian forbidding the application of torture to soldiers or their children under accusation, unless they had been dismissed the service ignominiously.[4] The same emperor published anew a rescript of Marcus Aurelius declaring the exemption of patricians and of the higher imperial officers, with their legitimate descendants to the fourth generation;[5] and also a dictum of Ulpian asserting the same privilege in favor of decurions, or local town councillors, and their children.[6] In 376, Valentinian was obliged to renew the declaration that decurions were only liable in cases of *majestas*, and in 399 Arcadius and Honorius found it necessary to declare explicitly that the privilege was personal and not official, and that it remained to them after laying down the decurionate.[7] Theodosius the Great, in 385, especially directed that priests should not be subjected to torture in giving testimony,[8] the significance of which is shown by the fact that no slave could be admitted to holy orders.

The necessity of this constant repetition of the law is indicated by a rescript of Valentinian, in 369, which shows that

[1] Tacit. Annal. XV. lvi. lvii.
[2] L. 10 § 6, Dig. XLVIII. xviii.
[3] L. 12, Dig. XLVIII. xviii. (Ulpian.).
[4] Const. 8 Cod. IX. xli. (Dioclet. et Maxim.).
[5] Const. 11 Cod. IX. xli.
[6] Ibid. § 1.
[7] Const. 16 Cod. IX. xli.
[8] Const. 8 Cod. I. 3.

freemen were not infrequently tortured in contravention of law; but that torture could legally be indiscriminately inflicted by any tribunal in cases of treason, and that in other accusations it could be authorized by the order of the emperor.[1] This power was early assumed and frequently exercised. Though Claudius at the commencement of his reign had sworn that he would never subject a freeman to the question, yet he allowed Messalina and Narcissus to administer torture indiscriminately, not only to free citizens, but even to knights and patricians.[2] So Domitian tortured a man of prætorian rank on a doubtful charge of intrigue with a vestal virgin,[3] and various laws were promulgated by several emperors directing the employment of torture irrespective of rank, in some classes of accusations. Thus, in 217, Caracalla authorized it in cases of suspected poisoning by women.[4] Constantine decreed that unnatural lusts should be punished by the severest torments, without regard to the station of the offender.[5] Constantius persecuted in like manner soothsayers, sorcerers, magicians, diviners, and augurs, who were to be tortured for confession, and then to be put to death with every refinement of suffering.[6] So, Justinian, under certain circumstances, ordered torture to be used on parties accused of adultery[7]—a practice, however, which was already common in the fourth century, if we are to believe the story related by St. Jerome of a miracle occurring in a case of this nature.[8] The power thus assumed by the monarch could evidently be limited only by his discretion in its exercise.

One important safeguard, however, existed, which, if properly maintained, must have greatly lessened the frequency

[1] Const. 4 Cod. IX. viii.

[2] Dion. Cass. Roman. Hist. Lib. LX. (Ed. 1592, p. 776).

[3] Sueton. Domit. cap. viii. To Domitian the historian also ascribes the invention of a new and infamously indecent kind of torture (Ibid. cap. x.).

[4] Const. 3 Cod. IX. xli.

[5] Const. 31 Cod. IX. ix.

[6] Const. 7 Cod. IX. viii.

[7] Novell. CXVII. cap. xv. § 1.

[8] Hieron. Epist. I. ad Innocent.

of torture as applied to freemen. In bringing an accusation the accuser was obliged to inscribe himself formally, and was exposed to the *lex talionis* in case he failed to prove the justice of the charge.[1] A rescript of Constantine, in 314, decrees that in cases of *majestas*, as the accused was liable to the severity of torture without limitation of rank, so the accuser and his informers were to be tortured when they were unable to make good their accusation.[2] This enlightened legislation was preserved by Justinian, and must have greatly cooled the ardor of the pack of calumniators and informers, who, from the days of Sylla, had been encouraged and petted until they held in their hands the life of almost every citizen.

In all this it must be borne in mind that the freeman of the Roman law was a Roman citizen, and that, prior to the extension of citizenship generally to the subjects of the Empire, there was an enormous class deprived of the protection, such as it was, of the traditional exemption. Thus when, in Jerusalem, the Jews raised a tumult and accused St. Paul, without specifying his offence, the tribune forthwith ordered "that he should be examined by scourging, that he might know wherefore they cried so against him;" and when St. Paul proclaimed himself a Roman, the preparations for his torture were stopped forthwith, and he was examined by regular judicial process.[3] The value of this privilege is fairly exemplified by the envying remark of the tribune, "With a great sum obtained I this freedom."

All these laws relate to the extortion of confessions from the accused. In turning to the treatment of witnesses, we find that even with them torture was not confined to the servile condition. With slaves it was not simply a consequence of slavery, but a mode of confirming and rendering admissible the testimony of those whose character was not sufficiently known to give their evidence credibility without it. Thus a

[1] Const. 17 Cod. IX ii.—Const. 10 Cod. IX. xlvi.

[2] Const. 3 Cod. IX. viii.

[3] Acts, XXII. 24 sqq.

legist under Constantine states that gladiators and others of similar occupation cannot be allowed to bear witness without torture;[1] and, in the same spirit, a novel of Justinian, in 539, directs that the rod shall be used to extract the truth from unknown persons who are suspected of bearing false witness or of being suborned.[2]

It may, therefore, readily be imagined that when the evidence of slaves was required, it was necessarily accompanied by the application of torture. Indeed, Augustus declared that while it is not to be expressly desired in trifling matters, yet in weighty and capital cases the torture of slaves is the most efficacious mode of ascertaining the truth.[3] When we consider the position occupied by slavery in the Roman world, the immense proportion of bondmen who carried on all manner of mechanical and industrial occupations for the benefit of their owners, and who, as scribes, teachers, stewards, and in other confidential positions, were privy to almost every transaction of their masters, we can readily see that scarce any suit could be decided without involving the testimony of slaves, and thus requiring the application of torture. It was not even, as among most modern nations, restricted to criminal cases. Some doubt, indeed, seems at one time to have existed as to its propriety in civil actions, but Antoninus Pius decided the question authoritatively in the affirmative, and this became a settled principle of Roman jurisprudence, even when the slaves belonged to masters who were not party to the case at issue.[4]

There was but one limitation to the universal liability of slaves. They could not be tortured to extract testimony

[1] L. 21 § 2, Dig. XXII. v.

[2] Novell. XC. cap. i. § 1.

[3] Quæstiones neque semper in omni causa et persona desiderari debere arbitror; et cum capitalia et atrociora maleficia non aliter explorari et investigari possunt, quam per servorum quæstiones, efficacissimas esse ad requirendam veritatem existimo et habendas censeo.—L. 8, Dig. XLVIII. xviii. (Paulus).

[4] L. 9, Dig. XLVIII. xviii. (Marcianus).

against their masters, whether in civil or criminal cases;[1] though, if a slave had been purchased by a litigant to get his testimony out of court, the sale was pronounced void, the price was refunded, and the slave could then be tortured.[2] This limitation arose from a careful regard for the safety of the master, and not from any feeling of humanity towards the slave. So great a respect, indeed, was paid to the relationship between the master and his slave that the principle was pushed to its fullest extent. Thus even an employer, who was not the owner of a slave, was protected against the testimony of the latter.[3] When a slave was held in common by several owners, he could not be tortured in opposition to any of them, unless one were accused of murdering his partner.[4] A slave could not be tortured in a prosecution against the father or mother of the owner, or even against the guardian, except in cases concerning the guardianship;[5] though the slave of a husband could be tortured against the wife.[6] Even the tie which bound the freedman to his patron was sufficient to preserve the former from being tortured against the latter;[7] whence we may assume that, in other cases, manumission afforded no protection from the rack and scourge. This question, however, appears doubtful. The exemption of freedmen would seem to be proved by the rescript which provides that inconvenient testimony should not be got rid of by manumitting slaves so as to prevent their being subjected to torture;[8] while, on the other hand, a decision of Diocletian directs that, in

[1] L. 9 § 1, Dig. XLVIII. xviii.—L. 1 § 16, Dig. XLVIII. xvii. (Severus)—L. 1 § 18, Dig. XLVIII. xviii. (Ulpian.).

[2] Pauli Lib. v. Sentt. Tit. xvi. § 7.—The same principle is involved in a rescript of the Antonines.—L. 1 § 14, Dig. XLVIII. xvii. (Severus).

[3] L. 1 § 7, Dig. XLVIII. xvii. The expression "in caput domini" applies as well to civil as to criminal cases.—Pauli Lib. v. Sentt. Tit. xvi. § 5.

[4] L. 3, Dig. XLVIII. xviii.—Const. 13 Cod. IX. xli.

[5] L. 10 § 2, Dig. XLVIII. xviii.—Const. 2 Cod. IX. xli. (Sever. et Antonin. ann. 205).

[6] L. 1 § 11, Dig. XLVIII. xvii. [7] L. 1 § 9, Dig. XLVIII. xvii.

[8] L. 1 § 13. XLVIII. xvii.—Pauli Lib. v. Sentt. Tit. xvi. § 9.

cases of alleged fraudulent wills, the slaves and even the freedmen of the heir could be tortured to ascertain the truth.[1]

This policy of the law in protecting masters from the evidence of their tortured slaves varied at different periods. From an expression of Tacitus, it would seem not to have been part of the original jurisprudence of the Republic, but to have arisen from a special decree of the Senate. In the early days of the Empire, while the monarch still endeavored to veil his irresponsible power under the forms of law, and showed his reverence for ancient rights by evading them rather than by boldly subverting them, Tiberius, in prosecuting Libo and Silanus, caused their slaves to be transferred to the public prosecutor, and was thus able to gratify his vengeance legally by extorting the required evidence.[2] Subsequent emperors were not reduced to these subterfuges, for the principle became established that in cases of *majestas*, even as the freeman was liable to torture, so his slaves could be tortured to convict him;[3] and as if to show how utterly superfluous was the cunning of Tiberius, the respect towards the master in ordinary affairs was carried to that point that no slave could be tortured against a former owner with regard to matters which had occurred during his ownership.[4] On the other hand, according to Ulpian, Trajan decided that when the confession of a guilty slave under torture implicated his master, the evidence could be used against the master, and this, again, was revoked by subsequent constitutions.[5] Indeed, it became a settled principle of law to reject all incriminations of accomplices.

[1] Const. 10 Cod. IX. xli. (Dioclet. et Maxim.).

[2] Tacit. Annal. II. 30. See also III. 67. Somewhat similar in spirit was his characteristic device for eluding the law which prohibited the execution of virgins (Sueton. Tiber. lxi.).

[3] This principle is embodied in innumerable laws. It is sufficient to refer to Constt. 6 § 2, 7 § 1, 8 § 1, Cod. IX. viii.

[4] L. 18 § 6, Dig. XLVIII. xviii. (Paulus).

[5] L. 1 § 19, Dig. XLVIII. xviii. (Ulpian.).

Having thus broken down the protection of the citizen against the evidence of his slaves in accusations of treason, it was not difficult to extend the liability to other special crimes. Accordingly we find that, in 197, Septimius Severus specified adultery, fraudulent assessment, and crimes against the state as cases in which the evidence of slaves against their masters was admissible.[1] The provision respecting adultery was repeated by Caracalla in 214, and afterwards by Maximus,[2] and the same rule was also held to be good in cases of incest.[3] It is probable that this increasing tendency alarmed the citizens of Rome, and that they clamored for a restitution of their immunities, for, when Tacitus was elected emperor, in 275, he endeavored to propitiate public favor by proposing a law to forbid the testimony of slaves against their masters except in cases of *majestas*.[4] No trace of such a law, however, is found in the imperial jurisprudence, and the collections of Justinian show that the previous regulations were in full force in the sixth century.

Yet it is probable that the progress of Christianity produced some effect in mitigating the severity of legal procedure and in shielding the unfortunate slave from the cruelties to which he was exposed. Under the Republic, while the authority of the *paterfamilias* was still unabridged, any one could offer his slaves to the torture when he desired to produce their evidence. In the earlier times, this was done by the owner himself in the presence of the family, and the testimony thus extorted was carefully taken down to be duly produced in court; but subsequently the proceeding was conducted by public officers—the quæstors and triumviri capitales.[5] How great was the change effected is seen by the declaration of Diocletian, in 286, that masters were not permitted to bring

[1] Const. 1 Cod. IX. xli. (Sever et Antonin.).

[2] Constt. 3, 32 Cod. IX. ix.—L. 17, XLVIII. xviii. (Papin.).

[3] L. 5 Dig. XLVIII. xviii. (Marcian.).

[4] Fl. Vopisc. Tacit. cap. IX.

[5] Du Boys, Hist. du Droit Crim. des Peup. Anciens. pp. 297, 331, 332.

forward their own slaves to be tortured for evidence in cases wherein they were personally interested.[1] This would necessarily reduce the production of slave testimony, save in accusations of *majestas* and other excepted crimes, to cases in which the slaves of third parties were desired as witnesses; and even in these, the frequency of its employment must have been greatly reduced by the rule which bound the party calling for it to deposit in advance the price of the slave, as estimated by the owner, to remunerate the latter for his death, or for his diminished value if he were maimed or crippled for life.[2] When the slave himself was arraigned upon a false accusation and tortured, an old law provided that the master should receive double the loss or damage sustained;[3] and in 383, Valentinian the Younger went so far as to decree that those who accused slaves of capital crimes should inscribe themselves, as in the case of freemen, and should be subjected to the *lex talionis* if they failed to sustain the charge.[4] This was an immense step towards equalizing the legal condition of the bondman and his master. It was apparently in advance of public opinion, for the law is not reproduced in the compilations of Justinian, and probably soon was disregarded.

There were some general limitations imposed on the application of torture, but they were hardly such as to prevent its abuse at the hands of cruel or unscrupulous judges. Antoninus Pius set an example, which modern jurists might well have imitated, when he directed that no one should be tortured after confession to implicate others;[5] and a rescript of the same enlightened emperor fixes at fourteen the minimum limit

[1] Const. 7 Cod. IX. xli. (Dioclet. et Maxim.).

[2] Pauli Lib. v. Sentt. Tit. xvi. § 3.—See also Ll. 6, 13 Dig. XLVIII. xviii.

[3] Const. 6 Cod. IX. xlvi. This provision of the L. Julia appears to have been revived by Diocletian.

[4] Lib. IX. Cod. Theod. i. 14.

[5] L. 16 § 1, Dig. XLVIII. xviii. (Modestin.).

of age liable to torture, except in cases of *majestas*, when, as we have seen, the law spared no one, for in the imperial jurisprudence the safety of the monarch overrode all other considerations.[1] Women were spared during pregnancy.[2] Moderation was enjoined upon the judges, who were to inflict only such torture as the occasion rendered necessary, and were not to proceed further at the will of the accuser.[3] No one was to be tortured without the inscription of a formal accuser, who rendered himself liable to the *lex talionis*, unless there were violent suspicions to justify it;[4] and Adrian reminded his magistrates that it should be used for the investigation of truth, and not for the infliction of punishment.[5] Adrian further directed, in the same spirit, that the torture of slave witnesses should only be resorted to when the accused was so nearly convicted that it alone was required to confirm his guilt.[6] Diocletian ordered that proceedings should never be commenced with torture, but that it might be employed when requisite to complete the proof, if other evidence afforded rational belief in the guilt of the accused.[7]

What was the exact value set upon evidence procured by torture it would be difficult at this day to determine. We have seen above that Augustus pronounced it the best form of proof, but other legislators and jurists thought differently. Modestinus affirms that it is only to be believed when there is no other mode of ascertaining the truth.[8] Adrian cautions his judges not to trust to the torture of a single slave, but to examine all cases by the light of reason and argument.[9] According to Ulpian, the imperial constitutions provided that it

[1] L. 10 Dig. XLVIII. xviii. (Arcad.).
[2] L. 3 Dig. XLVIII. xix. (Ulpian.).
[3] L. 10 § 3, Dig. XLVIII. xviii.
[4] L. 22 Dig. XLVIII. xviii.
[5] L. 21 Dig. XLVIII. xviii.
[6] L. 1 § 1, Dig. XLVIII. xviii. (Ulpian.).
[7] Const. 8 Cod. IX. xli. (Dioclet. et Maxim.).
[8] L. 7, Dig. XX. v.
[9] L. 1 § 4, Dig. XLVIII. xviii. (Ulpian.).

was not always to be received nor always rejected ; in his own opinion it was unsafe, dangerous, and deceptive, for some men were so resolute that they would bear the extremity of torment without yielding, while others were so timid that through fear they would at once inculpate the innocent.[1] From the manner in which Cicero alternately praises and discredits it, we can safely assume that lawyers were in the habit of treating it, not on any general principle, but according as it might affect their client in any particular case ; and Quintilian remarks that it was frequently objected to on the ground that under it one man's constancy makes falsehood easy to him, while another's weakness renders falsehood necessary.[2] That these views were shared by the public would appear from the often quoted maxim of Publius Syrus—"Etiam innocentes cogit mentiri dolor"—and from Valerius Maximus, who devotes his chapter *De Quæstionibus* to three cases in which it was erroneously either trusted or distrusted. A slave of M. Agrius was accused of the murder of Alexander, a slave of C. Fannius. Agrius tortured him, and, on his confessing the crime, handed him over to Fannius, who put him to death. Shortly afterwards, the missing slave returned home. This same Alexander was made of sterner stuff, for when he was subsequently suspected of being privy to the murder of C. Flavius, a Roman knight, he was tortured six times and persistently denied his guilt, though he subsequently confessed it and was duly crucified.[3] A somewhat similar case gave Apollonius of Tyana an opportunity of displaying his supernatural power. Meeting in Alexandria twelve convicts on their way to execution as robbers, he pronounced one of them to be innocent, and asked the executioners to reserve him to the last, and, moreover, delayed them by his conversation. After eight had been

[1] L. 1 § 23, Dig. XLVIII. xviii.—Res est fragilis et periculosa et quæ veritatem fallat.

[2] Altera sæpe etiam causam falsa dicendi, quod aliis patientia facile mendacium faciat, aliis infirmitas necessarium.—M. F. Quintil. Inst. Orat. v. iv.

[3] Val. Maximi Lib. VIII. c. iv.

beheaded, a messenger came in hot haste to announce that Phanion, the one selected by Apollonius, was innocent, though he had accused himself to avoid the torture.[1] A curious instance, moreover, of the little real weight attached to such evidence is furnished by the case of Fulvius Flaccus, in which the whole question turned upon the evidence of his slave Philip. This man was actually tortured eight times, and refused through it all to criminate his master, who was nevertheless condemned.[2] The same conclusion is to be drawn from the story told by St. Jerome of a woman of Vercelli repeatedly tortured on an accusation of adultery, and finally condemned to death in spite of her constancy in asserting her innocence, the only evidence against her being that of her presumed accomplice, extorted under torment.[3] Quintus Curtius probably reflects the popular feeling on the subject, in his pathetic narrative of the torture of Philotas on a charge of conspiracy against Alexander. After enduring in silence the extremity of hideous torment, he promised to confess if it were stopped, and when the torturers were removed he addressed his brother-in-law Craterus, who was conducting the investigation: "Tell me what you wish me to say." Curtius adds that no one knew whether or not to believe his final confession, for torture is as apt to bring forth lies as truth.[4]

From the instances given by Valerius Maximus, it may be inferred that there was no limit set upon the application of torture. The extent to which it might be carried appears to have rested with the discretion of the tribunals, for, with the exception of the general injunctions of moderation alluded to above, no instructions for its administration are to be found in the Roman laws which have been preserved to us, unless it be the rule that when several persons were accused as

[1] Philostrati vit. Apollon. VII. xxiv.

[2] Valer. Maxim. Lib. VIII. c. iv.

[3] Hieron. Epist. I. ad Innocentium.

[4] Q. Curt. Ruf. Hist. VI. xi. Anceps conjectura est quoniam et vera confessis et falsa dicentibus idem doloris finis ostenditur.

accomplices, the judges were directed to commence with the youngest and weakest.[1]

Since the time of Sigonius, much antiquarian research has been directed to investigating the various forms of torture employed by the Romans. They illustrate no principles, however, and it is sufficient to enumerate the rack, the scourge, fire in its various forms, and hooks for tearing the flesh, as the modes generally authorized by law. The Christian historians, in their narratives of the persecutions to which their religion was exposed, give us a more extended idea of the resources of the Roman torture chamber. Thus Prudentius, in his description of the martyrdom of St. Vincent, alludes to a number of varieties, among which we recognize some that became widely used in after times, showing that little was left for modern ingenuity to invent.[2]

I have dealt thus at length on the details of the Roman law of torture because, as will be seen hereafter, it was the basis of all modern legislation on the subject, and has left its impress on the far less humane administration of criminal justice in Europe almost to our own day. Yet at first it seemed destined to disappear with the downfall of the Roman power.

CHAPTER III.

THE BARBARIANS.

In turning from the nicely poised and elaborate provisions of the Imperial laws to the crude jurisprudence of the Barbarian hordes who gradually inherited the crumbling remains of the Empire of the West, we enter into social and political conditions so different that we are naturally led to expect a cor-

[1] Pauli Lib. v. Sentt. Tit. xiv. § 2.—L. 18 Dig. XLVIII. xviii.

[2] Aurel. Prudent. de Vincent. Hymn. v.

responding contrast in every detail of legislation. For the cringing suppliant of the audience chamber, abjectly prostrating himself before a monarch who combines in his own person every legislative and executive function, we have the freeman of the German forests, who sits in council with his chief, who frames the laws which both are bound to respect, and who pays to that chief only the amount of obedience which superior vigor and intellect may be able to enforce. The structure of such a society is fairly illustrated by the incident which Gregory of Tours selects to prove the kingly qualities of Clovis. During his conquest of Gaul, and before his conversion, his wild followers pillaged the churches with little ceremony. A bishop, whose cathedral had suffered largely, sent to the king to request that a certain vase of unusual size and beauty might be restored to him. Clovis could only promise that if the messenger would accompany him to Soissons, where the spoils were to be divided, and if the vase should chance to fall to his share, it should be restored. When the time came for allotting the plunder, he addressed his men, requesting as a special favor that the vase might be given to him before the division, but a sturdy soldier, brandishing his axe, dashed it against the coveted article, exclaiming, "Thou shalt take nothing but what the lot assigns to thee." For a year, Clovis dissembled his resentment at this rebuff, but at length, when opportunity offered, he was prompt to gratify it. While reviewing and inspecting his troops, he took occasion to reproach bitterly the uncourtly Frank with the condition of his weapons, which he pronounced unserviceable. The battle-axe excited his especial displeasure. He threw it angrily to the ground, and as the owner stooped to pick it up, Clovis drove his own into the soldier's head, with the remark, "It was thus you served the vase at Soissons."[1]

This personal independence of the freeman is one of the distinguishing characteristics of all the primitive Teutonic institu-

[1] Greg. Turon. Hist. Franc. Lib. II. c. xxvii.

tions. - Corporal punishments for him were unknown to the laws. The principal resource for the repression of crime was by giving free scope to the vengeance of the injured party, and by providing fixed rates of composition by which he could be bought off. As the criminal could defend himself with the sword against the *faida* or feud of his adversary, or could compound for his guilt with money, the suggestion of torturing him to extort a confession would seem an absurd violation of all his rights. Crimes were regarded solely as injuries to individuals, and the idea that society at large was interested in their discovery, punishment, and prevention, was entirely too abstract to have any influence on the legislation of so barbarous an age.

Accordingly, the codes of the Feini, the Ripuarians, the Alamanni, the Angli and Werini, the Frisians, the Saxons, and the Lombards contain no allusion to the employment of torture under any circumstances; and such few directions for its use as occur in the laws of the Salien Franks, of the Burgundians, and of the Baioarians, do not conflict with the general principle.

The personal inviolability which shielded the freeman cast no protection over the slave. He was merely a piece of property, and if he were suspected of a crime, the readiest and speediest way to convict him was naturally adopted. His denial could not be received as satisfactory, and the machinery of sacramental purgation or the judicial duel was not for him. If he were charged with a theft at home, his master would undoubtedly tie him up and flog him until he confessed, and if the offence were committed against a third party, the same process would necessarily be adopted by the court. Barbarian logic could arrive at no other mode of discovering and repressing crime among the friendless and unprotected, whose position seemed to absolve them from all moral responsibility.

The little that we know of the institutions of the ancient Gauls presents us with an illustration of the same principle developed in a somewhat different direction. Cæsar states that,

when a man of rank died, his relatives assembled and investigated the circumstances of his death. If suspicion alighted upon his wives, they were tortured like slaves, and if found guilty they were executed with all the refinements of torment.[1]

In accordance with this tendency of legislation, therefore, we find that among the Barbarians the legal regulations for the torture of slaves are intended to protect the interests of the owner alone. When a slave was accused of crime the master, indeed, could not refuse to hand him over to the torturer, unless he were willing to pay for him the full *wergild* of a freeman, and if the slave confessed under the torture, the master had no claim for compensation arising either from the punishment or crippling of his bondman.[2] When, however, the slave could not be forced to confess and was acquitted, the owner had a claim for damages, though no compensation was made to the unfortunate sufferer himself. The original law of the Burgundians, promulgated in 471, is the earliest of the Teutonic codes extant, and in that we find that the accuser who failed to extract a confession was obliged to give to the owner another slave, or to pay his value.[3] The Baioarian law is equally careful of the rights of ownership, but seems in addition to attach some criminality to the excess of torture by the further provision that, if the slave die under the torment without confession, the prosecutor shall pay to the owner two slaves of like value, and if unable to do so, that he shall himself be delivered up as a slave.[4] The Salic law, on the other

[1] De Bell. Gall. VI. xix.

[2] These provisions are specified only in the Salic Law (First Text of Pardessus, Tit. XL. §§ 6, 7, 8, 9, 10.—L. Emend. Tit. XLII. §§ 8, 9, 10, 11, 12, 13), but they were doubtless embodied in the practice of the other tribes.

[3] L. Burgund. Tit. VII.—The other allusions to torture in this code, Tit. XXXIX. §§ 1, 2, and Tit. LXXVII. §§ 1, 2, also refer only to slaves, *coloni*, and *originarii*. Persons suspected of being fugitive slaves were always tortured to ascertain the fact, which is in direct contradiction to the principles of the Roman law.

[4] L. Baioar. Tit. VIII. c. xviii. §§ 1, 2, 3.

hand, only guards the interests of the owner by limiting the torture to 120 blows with a rod of the thickness of the little finger. If this does not extort a confession, and the accuser is still unsatisfied, he can deposit with the owner the value of the slave, and then proceed to torture him at his own risk and pleasure.[1]

It will be observed that all these regulations provide merely for extracting confessions from accused slaves, and not testimony from witnesses. Indeed, the system of evidence adopted by all the Barbarian laws for freemen was of so different a character, that no thought seems to have been entertained of procuring proof by the torture of witnesses. The only allusion, indeed, to such a possibility shows how utterly repugnant it was to the Barbarian modes of thought. In some MSS. of the Salic law there occurs the incidental remark that when a slave accused is under the torture, if his confession implicates his master, the charge is not to be believed.[2]

Such was the primitive legislation of the Barbarians, but though in principle it was long retained, in practice it was speedily disregarded by those whom irresponsible power elevated above the law. The Roman populations of the conquered territories were universally allowed to live under their old institutions; in fact, law everywhere was personal and not territorial, every race and tribe, however intermingled on the

[1] L. Salic. First Text, Tit. XL. §§ 1, 2, 3, 4.—L. Emend. Tit. XLII. §§ 1, 2, 3, 4, 5.—In a treaty between Childebert and Clotair, about the year 593, there is, however, a clause which would appear to indicate that in doubtful cases slaves were subjected, not to torture, but to the ordeal of chance. "Si servus in furto fuerit inculpatus, requiratur a domino ut ad viginti noctes ipsum in mallum præsentet. Et si dubietas est, ad sortem ponatur" (Pact. pro Tenore pacis cap. v.—Baluz.). This was probably only a temporary international regulation to prevent frontier quarrels and reprisals. That it had no permanent force of law is evident from the retention of the procedures of torture in all the texts of the Salic law, including the revision by Charlemagne.

[2] First Text, Tit. XL. § 4.—MS. Monaster. Tit. XL. § 3.—L. Emend. Tit. XLII. § 6.

same soil, being subjected to its own system of jurisprudence. The summary process of extracting confessions and testimony which the Roman practice thus daily brought under the notice of the Barbarians could not but be attractive to their violent and untutored passions. Their political system was too loose and undefined to maintain the freedom of the Sicambrian forests in the wealthy plains of Gaul, and the monarch, who, beyond the Rhine, had scarce been more than a military chief, speedily became a despot, whose power over those immediately around him was limited only by the fear of assassination, and over his more distant subjects by the facility of revolution.

When all thus was violence, and the law of the strongest was scarcely tempered by written codes, it is easy to imagine that the personal inviolability of the freeman speedily ceased to guarantee protection. Even amid the wild tribes which remained free from the corruptions of civilization the idea of torturing for confession the friendless and unprotected was not unfamiliar, and in the Elder Edda we find King Geirröd using the torment of fire for eight days on Odin, who visits him in disguise for the purpose of testing his hospitality.[1] Among the Gallic Franks, therefore, it need not surprise us to see irresponsible power readily grasping at such means to gratify hate or ambition. In the long and deadly struggle between Fredegonda and Brunhilda, for example, the fierce passions of the adversaries led them to employ without scruple the most cruel tortures in the endeavor to fathom each other's plots.[2] A single case may be worth recounting to show how completely torture had become a matter of course as the first resource in the investigation of doubtful questions. When Leudastes, about the year 580, desired to ruin the pious Bishop Gregory of Tours, he accused him to Chilperic I. of slander-

[1] Grimnismal, Thorpe's Sæmund's Edda, I. 20.

[2] Greg. Turon. Hist. Franc. Lib. VII. c. xx.; Lib. VIII. cap. xxxi. Also, Lib. V. cap. xxxvii.—Aimoin. Lib. III. c. xxx. xlii. li. lxiv. lxvii.—Flodoard. Hist. Remens. Lib. ii. c. ii.—Greg. Turon. Miraculorum Lib. I. cap. 73.

ing the fair fame of Queen Fredegonda, and suggested that full proof for condemnation could be had by torturing Plato and Gallienus, friends of the bishop. He evidently felt that nothing further was required to substantiate the charge, nor does Gregory himself, in narrating the affair, seem to think that there was anything irregular in the proposition. Gallienus and Plato were seized, but from some cause were discharged unhurt. Then a certain Riculfus, an accomplice of Leudastes, was reproached for his wickedness by a man named Modestus, whereupon he accused Modestus to Fredegonda, who promptly caused the unhappy wretch to be severely tortured without extracting any information from him, and he was imprisoned until released by the miraculous aid of St. Medard. Finally, Gregory cleared himself canonically of the imputation, and the tables were turned. Leudastes sought safety in flight. Riculfus was not so fortunate. Gregory begged his life, but could not save him from being tortured for confession. For six hours the wretched man was hung up with his hands tied behind his back, after which, stretched upon the rack, he was beaten with clubs, rods, and thongs, by as many as could get at him, until, as Gregory naïvely remarks, no piece of iron could have borne it. At last, when nearly dead, his resolution gave way, and he confessed the whole plot by which it had been proposed to get rid of Chilperic and Fredegonda, and to place Clovis on the throne.[1] Now, Plato, Gallienus, and Modestus were probably of Gallo-Roman origin, but Riculfus was evidently of Teutonic stock; moreover, he was a priest, and Plato an archdeacon, and the whole transaction shows that Roman law and Frankish law were of little avail against the unbridled passions of the Merovingian.

[1] Gregor. Turon. Hist. Franc. Lib. v. c. xlix.

CHAPTER IV.

THE GOTHS AND SPAIN.

Of all the Barbarian tribes, none showed themselves so amenable to the influences of Roman civilization as the Goths. Their comparatively settled habits, their early conversion to Christianity, and their position as allies of the empire long before they became its conquerors, rendered them far less savage under Alaric than were the Franks in the time of Clovis. The permanent occupation of Septimania and Catalonia by the Wisigoths, also, took place at a period when Rome was not as yet utterly sunk, and when the power of her name still possessed something of its ancient influence, which could not but modify the institutions of the new-comers as they strove to adapt their primitive customs to the altered circumstances under which they found themselves. It is not to be wondered at, therefore, if their laws reflect a condition of higher civilization than those of kindred races, and if the Roman jurisprudence has left in them traces of the appreciation of that wonderful work of the human intellect which the Goths were sufficiently enlightened to entertain.

The Ostrogoths, allowing for the short duration of their nationality, were even more exposed to the influences of Rome. Their leader, Theodoric, had been educated in Constantinople, and was fully as much a Roman as many of the Barbarian soldiers who had risen to high station under the emperors, or even to the throne itself. All his efforts were directed to harmonizing the institutions of his different subjects, and he was too sagacious not to see the manifest superiority of the Roman polity.

His kingdom was too evanescent to consolidate and perfect

its institutions or to accumulate any extended body of jurisprudence. What little exists, however, manifests a compromise between the spirit of the Barbarian tribes of the period and that of the conquered mistress of the world. The Edict of Theodoric does not allude to the torture of freemen, and it is probable that the free Ostrogoth could not legally be subjected to it. With respect to slaves, its provisions seem mainly borrowed from the Roman law. No slave could be tortured against a third party for evidence unless the informer or accuser was prepared to indemnify the owner at his own valuation of the slave. No slave could be tortured against his master, but the purchase of a slave to render his testimony illegal was pronounced null and void; the purchase money was returned, and the slave was tortured. The immunity of freedmen is likewise shown by the cancelling of any manumission conferred for the purpose of preventing torture for evidence.[1] Theodoric, however, allowed his Roman subjects to be governed by their ancient laws, and he apparently had no repugnance to the use of torture when it could legally be inflicted. Thus he seems particularly anxious to ferret out and punish sorcerers, and in writing to the Prefect and Count of Rome he urges them to apprehend certain suspected parties, and try them by the regular legal process, which, as we have seen, by the edicts of Constantius and his successors, was particularly severe in enjoining torture in such cases, both as a means of investigation and of punishment.[2]

On the other hand, the Wisigoths founded a permanent state, and as they were the only race whose use of torture was uninterrupted from the period of their settlement until modern times, and as their legislation on the subject was to a great extent a model for that of other nations, it may be worth while to examine it somewhat closely.

[1] Edict. Theodor. cap. c. ci. cii.

[2] Cassiodor. Variar. iv. xxii. xxiii.

The earliest code of the Wisigoths is supposed to have been compiled by Eurik, in the middle of the fifth century, but it was subsequently much modified by recensions and additions. It was remoulded by Chindaswind and Recaswind about the middle of the seventh century, and it has reached us only in this latest condition, while the MSS. vary so much in assigning the authorship of the various laws that but little reliance can be placed upon the assumed dates of most of them. Chindaswind, moreover, in issuing his revised code, prohibited for the future the use of the Roman law, which had previously been in force among the subject populations, under codes specially prepared for them by order of Alaric II. Thus the Wisigothic laws, as we have them, are not laws of race, like the other Barbarian codes, but territorial laws carefully digested for a whole nation by men conversant alike with the Roman and with their own ancestral jurisprudence.

It is therefore not surprising to find in them the use of torture legalized somewhat after the fashion of the imperial constitutions, and yet with some humane modifications and restrictions. Slaves were liable to torture under accusation, but the accuser had first to make oath that he was actuated by neither fraud nor malice in preferring the charge; and he was further obliged to give security that he would deliver to the owner another slave of equal value if the accused were acquitted. If an innocent slave were crippled in the torture, the accuser was bound to give two of like value to the owner, and the sufferer received his freedom. If the accused died under the torture, the judge who had manifested so little feeling and discretion in permitting it was also fined in a slave of like value, making three enuring to the owner, and careful measures were prescribed to insure that a proper valuation was made. If the accuser was unable to meet the responsibility thus incurred, he was himself forfeited as a slave. Moreover, the owner was always at liberty to save his slave from the torture by proving his innocence otherwise if possible; and if he suc-

ceeded, the accuser forfeited to him a slave of equal value, and was obliged to pay all the costs of the proceedings.[1]

Freedmen were even better protected. They could only be tortured for crimes of which the penalties exceeded a certain amount, varying with the nature of the freedom enjoyed by the accused. If no confession were extorted, and the accused were crippled in the torture, the judge and the accuser were both heavily fined for his benefit, and if he died, the fines were paid to his family.[2]

There could have been little torturing of slaves as witnesses, for in general their evidence was not admissible, even under torture, against any freeman, including their masters. The slaves of the royal palace, however, could give testimony as though they were freemen,[3] and, as in the Roman law, there were certain excepted crimes, such as treason, adultery, homicide, sorcery, and coining, in accusations of which slaves could be tortured against their masters, nor could they be preserved by manumission against this liability.[4]

As regards freemen, the provisions of different portions of the code do not seem precisely in harmony, but all of them throw considerable difficulties in the way of procedures by torture. An early law directs that, in cases of theft or fraud, no one shall be subjected to torture unless the accuser bring forward the informer, or inscribe himself with three sureties to undergo the *lex talionis* in case the accused prove innocent. Moreover, if no confession were extorted, the informer was to be produced. If the accuser could not do this, he was bound to name him to the judge, who was then to seize him, unless he were protected by some one too powerful for the judicial authority to control. In this event it was the duty of the judge to summon the authorities to his aid, and in default of so doing he was liable for all the damages arising from the

[1] L. Wisigoth. Lib. VI. Tit. i. l. 5.

[2] Ibid.

[3] Ibid. II. iv. 4.

[4] Ibid. VI. i. 4; VII. vi. 1; VIII. iv. 10, 11.

case. The informer, when thus brought within control of the court, was, if a freeman, declared infamous, and obliged to pay ninefold the value of the matter in dispute; if a slave, sixfold, and to receive a hundred lashes. If the freeman were too poor to pay the fine, he was adjudged as a slave in common to the accuser and the accused.[1]

A later law, issued by Chindaswind, is even more careful in its very curious provisions. No accuser could force to the torture a man higher in station or rank than himself. The only cases in which it could be inflicted on nobles were those of treason, homicide, and adultery, while for freemen of humbler position the crime must be rated at a fine of 500 solidi at least. In these cases, an open trial was first prescribed. If this were fruitless, the accuser who desired to push the matter bound himself in case of failure to deliver himself up as a slave to the accused, who could maltreat him at pleasure, short of taking his life, or compound with him at his own valuation of his sufferings. The torture then might last for three days; the accuser himself was the torturer, subject to the supervision of the judge, and might inflict torment to any extent that his ingenuity could suggest, short of producing permanent injury or death. If death resulted, the accuser was delivered to the relatives of the deceased to be likewise put to death; the judge who had permitted it through collusion or corruption was exposed to the same fate, but if he could swear that he had not been bribed by the accuser, he was allowed to escape with a fine of 500 solidi. A very remarkable regulation, moreover, provided against false confessions extorted by torment. The accuser was obliged to draw up his accusation in all its details, and submit it secretly to the judge. Any confession under torture which did not agree substantially with this was set aside, and neither convicted the accused nor released the accuser from the penalties to which he was liable.[2]

[1] L. Wisigoth. VI. i. 1. [2] Ibid. VI. i. 2.

Under such a system, strictly enforced, few persons would be found hardy enough to incur the dangers of subjecting an adversary to the rack. As with the Franks, however, so among the Wisigoths, the laws were not powerful enough to secure their own observance. The authority of the kings grew gradually weaker and less able to repress the assumptions of ambitious prelates and unruly grandees, and it is easy to imagine that in the continual struggle all parties sought to maintain and strengthen their position by an habitual disregard of law. At the Thirteenth Council of Toledo, in 683, King Erwig, in his opening address, alludes to the frequent abuse of torture in contravention of the law, and promises a reform. The council, in turn, deplores the constantly recurring cases of wrong and suffering wrought "regiæ subtilitatis astu vel profanæ potestatis instinctu," and proceeds to decree that in future no freeman, noble, or priest shall be tortured unless regularly accused or indicted, and properly tried in public; and this decree duly received the royal confirmation.[1]

As the Goths emerge again into the light of history after the Saracenic conquest, we find these ancient laws still in force among the descendants of the refugees who had gathered around Don Pelayo. The use of the Latin tongue gradually faded out among them, and about the twelfth or thirteenth century the Wisigothic code was translated into the popular language, and this Romance version, known as the *Fuero Juzgo*, long continued the source of law in the Peninsula. In this, the provisions of the early Gothic monarchs respecting torture are textually preserved, with two trifling exceptions, which may reasonably be regarded as scarcely more than mere errors of copyists.[2] Torture was thus maintained in Spain as

[1] Concil. Toletan. XIII. ann. 683, can. ii.

[2] See the Fuero Juzgo, Lib. I. Tit. iii. l. 4; Tit. iv. l. 4.—Lib. III. Tit. iv. ll. 10, 11.—Lib. VI. Tit. i. ll. 2, 4, 5.—Lib. VII. Tit. i. l. 1; Tit. vi. l. 1. The only points in which these vary from the ancient laws are that, in Lib. VI. Tit. i. l. 2, adultery is not included among the crimes for suspicion of which nobles can be tortured, and that the accuser is not directed to con-

an unbroken ancestral custom, and the earliest reference which I have met with of it in mediæval jurisprudence occurs in 1228, when Don Jayme el Conquistador of Aragon forbade his representatives from commencing proceedings by its employment without special orders.[1] When Alfonso the Wise, about the middle of the thirteenth century, attempted to revise the jurisprudence of his dominions, in the code known as *Las Siete Partidas*, which he promulgated, he only simplified and modified the proceedings, and did not remove the practice. Although he proclaimed that the person of man is the noblest thing of earth—"La persona del home es la mas noble cosa del mundo"[2]—he held that stripes and other torture inflicted judicially were no dishonor even to Spanish sensitiveness.[3] Asserting that torture was frequently requisite for the discovery of hidden crimes,[4] he found himself confronted by the Church, which taught, as we shall see hereafter, that confessions extorted under torture were invalid. To this doctrine he gave his full assent,[5] and then, to reconcile these apparently incompatible necessities, he adopted an expedient partially suggested not long before by Frederic II., which subsequently became almost universal throughout Europe, whereby the prohibition of conviction on extorted confessions

duct the torture. In Lib. VII. Tit. i. l. 1, also, the informer who fails to convict is condemned only in a single fine, and not ninefold; he is, however, as in the original, declared infamous, as a *ladro;* if a slave, the penalty is the same as with the Wisigoths.

[1] Jacobi Regis constitutio adversus Judæos, etc. c. xiii. (Marca Hispanica, p. 1416).

[2] Partidas, P. VII. Tit. i. l. 26. [3] Ibid. P. VII. Tit. ix. l. 16.

[4] Ca por los tormentos saben los judgadores muchas veces la verdad de los malos fechos encubiertos, que non se podrian saber dotra guisa.—Ibid. P. VII. Tit. xxx. l. 1.

[5] Por premia de tormentos ó de feridas, ó por miedo de muerte ó de deshonra que quieren facer á los homes, conoscen á las vegadas algunas cosas que de su grado non las conoscerien: e por ende decimos que la conoscencia que fuere fecha en algunas destas maneras que non debe valer nin empesce al que la face.—Ibid. P. III. Tit. xiii. l. 5.

was eluded. After confession under torture, the prisoner was remanded to his prison. On being subsequently brought before the judge he was again interrogated, when, if he persisted in his confession, he was condemned. If he recanted, he was again tortured; and, if the crime was grave, the process could be repeated a third time; but, throughout all, he could not be convicted unless he made a free confession apart from the torture. Even after conviction, moreover, if the judge found reason to believe that the confession was the result of fear of the torture, or of rage at being tortured, or of insanity, the prisoner was entitled to an acquittal.[1] The humane interference of the Church thus resulted only in a redoublement of cruelty; and the system once introduced, speedily tended to break down the limits imposed on it. In a little more than half a century after the death of Alfonso, judges were in the habit of not contenting themselves with three inflictions, but continued the torture as long as the prisoner confessed on the rack and retracted his confession subsequently.[2]

Alfonso's admiration of the Roman law led him to borrow much from it rather than from the Gothic code, though both are represented in the provisions which he established. Thus, except in accusations of treason, no one of noble blood could be tortured, nor a doctor of laws or other learning, nor a member of the king's council, or that of any city or town, except for official forgery, nor a pregnant woman, nor a child under fourteen years of age.[3] So, when several accomplices were on trial, the torturer was directed to commence with the

[1] Partidas, P. VII. Tit. xxx. l. 4.—Porque la conoscencia que es fecha en el tormento, si non fuere confirmada despues sin premia, non es valedera.

[2] Alvari Pelagii de Planctu Ecclesiæ, Lib. II. Art. xli.

[3] Partidas, P. VII. Tit. xxx. l. 2. Except the favor shown to the learned professions, "por honra de la esciencia," which afterwards became general throughout Europe, these provisions may all be found in the Roman law —Const. 4 Cod. IX. viii.; L. 3, Dig. XLVIII. xix.; L. 10, Dig. XLVIII. xviii.; Const. 11 Cod. IX. xli.

youngest and worst trained, as the truth might probably be more readily extracted from him.[1] The provision, also, that when a master, or mistress, or one of their children was found dead at home, all the household slaves were liable to torture in the search for the murderer, bears a strong resemblance to the cruel law of the Romans, which condemned them to death in case the murderer remained undiscovered.[2]

The regulations concerning the torture of slaves are founded, with little variation, on the Roman laws. Thus, the evidence of a slave was only admissible under torture, and no slave could be tortured to prove the guilt of a present or former owner, nor could a freedman, in a case concerning his patron, subject to the usual exceptions which we have already seen. The excepted crimes enumerated by Alfonso are seven, viz.: adultery, embezzlement of the royal revenues by tax collectors, high treason, murder of a husband or wife by the other, murder of a joint owner of a slave by his partner, murder of a testator by a legatee, and coining. With the slave, as with the freeman, all testimony under torture required subsequent confirmation.[3]

There is one noteworthy innovation, however, in the Partidas which was subsequently introduced widely into the torture codes of Europe, and which, in theory at least, greatly extended their sphere of action. This was the liability of freemen as witnesses. When a man's evidence was vacillating and contradictory, so as to afford reasonable suspicion that he was committing perjury, all criminal judges were empowered to subject him to torture, so as to ascertain the truth, provided always that he was of low condition, and did not belong to the excepted classes.[4]

With all this, there are indications that Alfonso designed

[1] Partidas, P. VII. Tit. xxx. l. 5.—Imitated from L. 18, Dig. XLVIII. xviii.

[2] Partidas, P. VII. Tit. xxx. l. 7. Cf. Tacit. Annal. XIV. xliii.-xlv.

[3] Partidas, P. VII. Tit. xxx. l. 16.

[4] Ibid. P. III. Tit. xvi. l. 43.—P. VII. Tit. xxx. l. 8.

rather to restrict than to extend the use of torture, and, if his general instructions could have been enforced, there must have been little occasion for its employment under his code. In one passage he directs that when the evidence is insufficient to prove a charge, the accused, if of good character, must be acquitted; and in another he orders its application only when common report is adverse to a prisoner, and he is shown to be a man of bad repute.[1] Besides, an accuser who failed to prove his charge was always liable to the *lex talionis*, unless he were prosecuting for an offence committed on his own person, or for the murder of a relative not more distant than a brother or sister's child.[2] The judge, moreover, was strictly enjoined not to exceed the strict rules of the law, nor to carry the torture to a point imperilling life or limb. If he deviated from these limits, or acted through malice or favoritism, he was liable to a similar infliction on his own person, or to a penalty greater than if he were a private individual.[3] The liability of witnesses was further circumscribed by the fact that in cases involving corporal punishment, no one could be forced to bear testimony who was related to either of the parties as far as the fourth degree of consanguinity, in either the direct or collateral lines, nor even when nearly connected by marriage, as in the case of fathers-in-law, step-children, etc.[4] Orders to inflict torture, moreover, were one of the few procedures which could be appealed from in advance.[5] Several of these limitations became generally adopted through Europe. We shall see, however, that they afforded little real protection to the accused, and it is more than probable that they received as little respect in Spain as elsewhere.

There were many varieties of torture in use at the period, but Alfonso informs us that only two were commonly employed,

[1] Partidas, P. VII. Tit. i. l. 26, "Home mal enfamado."—P. VII. Tit. xxx. l. 3, "Et si fuere home de mala fame ò vil."

[2] Ibid. P. VII. Tit. i. l. 26.

[3] Ibid. P. VII. Tit. xxx. l. 4; Tit. ix. l. 16.

[4] Ibid. P. VII. Tit. xxx. l. 9.

[5] Ibid. P. III. Tit. xxiii. l. 13.

the scourge and the strappado, which consisted in hanging the prisoner by the arms while his back and legs were loaded with heavy weights.[1] The former of these, however, seems to be the only one alluded to throughout the code.

As a whole, the Partidas were too elaborate and too much in advance of the wants of the age to be immediately successful as a work of legislation, and they were not confirmed by the Córtes until 1348. In the Ordenamiento de Alcalà of Alfonso XI., issued in that year, they are referred to as supplying all omissions in subsequent codes.[2]

It is probable that in his system of torture Alfonso the Wise merely regulated and put into shape the customs prevalent in his territories, for the changes in it which occurred during the succeeding three or four centuries are merely such as can be readily explained by the increasing influence of the revived Roman jurisprudence, and the introduction of the doctrines of the Inquisition with respect to criminal procedures. In the final shape which the administration of torture assumed in Castile, as described by Villadiego, an eminent legist writing about the year 1600, it was only employed when the proof was strong, and yet not sufficient for conviction. No allusion is made to the torture of witnesses, and Villadiego condemns the cruelty of some judges who divide the torture into three days in order to render it more effective, since, after a certain prolongation of torment, the limbs begin to lose their sensibility, which is recovered after an interval, and on the second and third days they are more sensitive than at first. This he pronounces rather a repetition than a continuation of torture, and repetition was illegal unless rendered necessary by the introduction of new testimony.[3] As in the thirteenth century, nobles, doctors of law, pregnant women, and children under fourteen were not liable, except in cases of high

[1] Partidas, P. VII. Tit. xxx. l. 1.

[2] Ordenamiento de Alcalà, Tit. xxviii. l. 1.

[3] Simancas, however, states that a single repetition of the torture was allowable.—De Cathol. Instit. Tit. LXV. No. 76.

treason and some other heinous offences. The clergy also were now exempted, unless previously condemned as infamous, and advocates engaged in pleading enjoyed a similar privilege. With the growth of the Inquisition, however, heresy had now advanced to the dignity of a crime which extinguished all prerogatives, for it was held to be a far more serious offence to be false to Divine than to human majesty.[1] The Partidas allow torture in the investigation of comparatively trivial offences, but Villadiego states that it should be employed only in the case of serious crimes, entailing bodily punishment more severe than the torture itself, and torture was worse than the loss of the hands. Thus, when only banishment, fines, or imprisonment were involved, it could not be used. The penalties incurred by judges for its excessive or improper application were almost identical with those prescribed by Alfonso, and the limitation that it should not be allowed to endanger life or limb was only to be exceeded in the case of treason, when the utmost severity was permissible.[2] In 1489 Ferdinand and Isabella had directed that no criminal case should be heard by less than three alcaldes or judges sitting together, and torture could not be employed without a formal decision signed unanimously by all three. In 1534 Charles V. called attention to the neglect of this rule, whereby the accused was deprived of the right of appeal, and he ordered that it should be strictly observed in future—regulations which duly maintained their place on the statute book as long as the use of torture was continued.[3]

Many varieties were in use, but the most common were the strappado and pouring water down the throat; but when the accused was so weak as to render these dangerous, fire was applied to the soles of the feet; and the use of the scourge

[1] De Cathol. Instit. Tit. LXV. No. 44–48. Cf. Novísima Recopilacion, Lib. VI. Tit, ii. leis 4 y 5 (Ed. 1775).

[2] Villadiego, Gloss. ad Fuero Juzgo, Lib. VI. Tit. i. l. 2, Gloss. *c*, *d*, *e*, *f*, *g*.

[3] Novísima Recopilacion, Lib. II. vii. leis 1 y 13.

was not unusual. As in the ancient laws, the owner of slaves was entitled to compensation when his bondmen were unjustly tortured. If there was no justification for it, he was reimbursed in double the estimated value; if the judge exceeded the proper measure of torment, he made it good to the owner with another slave.[1]

Whatever limitations may theoretically have been assigned to the application of torture, however, it is probable that they received little respect in practice. Simancas, Bishop of Badajos, who was a little anterior to Villadiego, speaks of it as a generally received axiom that scarcely any criminal accusation could be satisfactorily tried without torture.[2] This is confirmed by the account recently discovered by Bergenroth of the secret history of the execution of Don Carlos, for, whether it be authentic or not, it shows how thoroughly the use of torture had interpenetrated the judicial system of Spain. It states that when Philip II. determined to try his wretched son for the crime of encouraging the rebellious movements in the Netherlands, and the prince denied the offence, torture was applied until he fainted, and, on recovering his senses, consented to confess in order to escape the repetition which was about to be applied. It is hardly to be believed that even a Spanish imagination could invent the dark and terrible details of this dismal story; and even if it be not true, its author must have felt that such an incident was too probable to destroy its vraisemblance.

At the same time, Castilian justice kept itself free from one of the worst abuses which, as we shall see hereafter, grew out of the use of torture, in the secret inquisitorial process which established itself almost everywhere. A law of Alfonso XI. issued in 1325 peremptorily ordered that the accused should not be denied the right to know the contents of the inquest made with respect to him, and that the names of the witnesses

[1] Villadiego, *op. cit.* Lib. VI. Tit. i. l. 5, Gloss. *b*, *c*.

[2] Simancæ de Cathol. Instit. Tit. LXV. No. 8.

should be communicated to him so that he could defend himself freely and have all the means to which he was entitled of establishing his innocence. Ferdinand and Isabella, moreover, in 1480, decreed that all who desired counsel should be allowed the privilege, those who were poor being furnished at the public expense, and no torture could be inflicted before this was complied with. These laws, which offer so creditable a contrast to the legislation of other lands, remained in force and were embodied in the Recopilacion.[1]

CHAPTER V.

CARLOVINGIAN AND FEUDAL LAW.

In turning to the other barbarian races which inherited the fragments of the Roman empire, we find that the introduction of torture as a recognized and legal mode of investigation was long delayed. Under the Merovingians, as we have seen, its employment, though not infrequent, was exceptional and without warrant of law. When the slow reconstruction of society at length began, the first faint trace of torture is to be found in a provision respecting the crimes of sorcery and magic. These were looked upon with peculiar detestation, as offences against both God and man. It is no wonder then if the safeguards which the freeman enjoyed under the ordinary modes of judicial procedure were disregarded in the cases of those who violated every law, human and divine. The legislation of Charlemagne, indeed, was by no means merciful in its general character. His mission was to civilize, if possible, the

[1] Novísima Recopilacion, Lib. II. Tit. vi. lei 6; Lib. VIII. Tit. i. lei 4. Aragon is said to have been an exception as regards the use of torture (Gomez Var. Resolut. T. III. c. 13—*ap.* Gerstlacher. de Quæst. per Torment. p. 68). In Navarre there is no trace of the use of torture prior to the fifteenth century.—G. B. de Lagrèze, La Navarre Française, II. 342.

savage and turbulent races composing his empire, and he was not overnice in the methods selected to accomplish the task. Still, he did not venture, even if he desired, to prescribe torture as a means of investigation, except in the case of suspected sorcerers, for whom, moreover, it is ordered indirectly rather than openly.[1] Yet, by this time, the personal inviolability of the freeman was gone. The infliction of stripes and of hideous mutilations is frequently directed in the Capitularies, and even torture and banishment for life are prescribed as a punishment for insulting bishops and priests in church.[2]

This apparent inconsistency is only a repetition of what we have seen in the Persian and Indian institutions, where torture was superfluous in the presence of other forms of proof, and in Greece and Rome where it makes its appearance in the absence of those forms. Though there was no theoretical objection to torture as a process of investigation, yet there was no necessity for its employment as a means of evidence. That the idea of thus using it in matters of great moment was not unfamiliar to the men of that age is evident when we find it officially stated that the accomplices of Bernard, King of Italy, in his rebellion against Louis le Débonnaire, in 817, on their capture confessed the whole plot without being put to the torture.[3] Such instances, however, were purely exceptional. In ordinary matters, there was a complete system of attack and defence which supplemented all deficiencies of testimony in doubtful cases. Sacramental purgation, the wager of battle, and the various forms of vulgar ordeals were not only primæval customs suited to the feelings and modes of thought of the race, but they were also much more in harmony with the

[1] Capit. Carol. Mag. II. ann. 805, § XXV. (Baluz.). No other interpretation can well be given of the direction "diligentissime examinatione constringantur si forte confiteantur malorum quæ gesserunt. Sed tali moderatione fiat eadem districtio ne vitam perdant."

[2] Capitul. Lib. VI. cap. CXXIX.

[3] Non solum se tradunt sed ultro etiam non admoti quæstionibus omnem technam hujus rebellionis detegunt.—Goldast. Constit. Imp. I. 151.

credulous faith inculcated by the Church, and the Church had by this time entered on the career of temporal supremacy which gave it so potent a voice in fashioning the institutions of European society. For all these, the ministrations of the ecclesiastic were requisite, and in many of them his unseen agency might prove decisive. On the other hand, the humane precepts which forbade the churchman from intervening in any manner in judgments involving blood precluded his interference with the torture chamber; and in fact, while torture was yet frequent under the Merovingians, the canons of various councils prohibited the presence of any ecclesiastic in places where it was administered.[1] Every consideration, therefore, would lead the Church in the ninth century to prefer the milder forms of investigation, and to use its all-powerful influence in maintaining the popular belief in them. The time had not yet come when, as we shall see hereafter, the Church, as the spiritual head of feudal Christendom, would find the ordeal unnecessary and torture the most practicable instrumentality to preserve the purity of faith and the steadfastness of implicit obedience.

In the ninth century, moreover, torture was incompatible with the forms of judicial procedure handed down as relics of the time when every freeman bore his share in the public business of his sept. Criminal proceedings as yet were open and public. The secret inquisitions which afterwards became so favorite a system with lawyers did not then exist. The *mallum*, or court, was perhaps no longer held in the open air,[2]

[1] Non licet presbytero nec diacono ad trepalium ubi rei torquentur stare.—Concil. Autissiodor. ann. 578, can. xxxiii.

Ad locum examinationis reorum nullus clericorum accedat.—Concil. Matiscon. II. ann. 585, can. xix.

[2] Under Charlemagne and Louis le Débonnaire seems to have commenced the usage of holding the court under shelter. Thus Charlemagne, "Ut in locis ubi mallus publicus haberi solet, tectum tale constituatur quod in hiberno et in æstate observandus esse possit" (Capit. Carol. Mag. II. ann. 809, § xiii.). See also Capit. I. eod. ann. § xxv. Louis le Débon-

nor were the freemen of the district constrained as of old to be present,[1] but it was still free to every one. The accuser and his witnesses were confronted with the accused, and the criminal must be present when his sentence was pronounced.[2] The purgatorial oath was administered at the altar of the parish church; the ordeal was a public spectacle; and the judicial duel drew thousands of witnesses as eager for the sight of blood as the Roman plebs. These were all ancestral customs, inspiring implicit reverence, and forming part of the public life of the community. To substitute for them the gloomy dungeon through whose walls no echo of the victim's screams could filter, where impassible judges coldly compared the incoherent confession wrung out by insufferable torment with the anonymous accusation or the depositions of secret witnesses, required a total change in the constitution of society.

The change was long in coming. Feudalism arose and consolidated its forces on the ruins of the Carlovingian empire without altering the principles upon which the earlier procedures of criminal jurisdiction had been based. As the

naire prohibits the holding of courts in churches, and adds, "Volumus utique ut domus a comite in locum ubi mallum teneri debet construatur ut propter calorem solis et pluviam publica utilitas non remaneat" (Capit. Ludov. Pii. I. ann. 819, § xiv.).

[1] In 769, we find Charlemagne commanding the presence of all freemen in the general judicial assembly held twice a year, "Ut ad mallum venire nemo tardet, unum circa æstatem et alterum circa autumnum." At others of less importance, they were only bound to attend when summoned, "Ad alia vero, si necessitas fuerit, vel denunciatio regis urgeat, vocatus venire nemo tardet" (Capit. Carol. Mag. ann. 769, § xii.).

In 809, he desired that none should be forced to attend unless he had business, "Ut nullus ad placitum venire cogatur, nisi qui caussam habet ad quærendam" (Capit. I. ann. 809, § xiii.).

In 819, Louis ordered that the freemen should attend at least three courts a year, "et nullus eos amplius placita observare compellat, nisi forte quilibet aut accusatus fuerit, aut alium accusaverit, aut ad testimonium perhibendum vocatus fuerit" (Capit. Ludov. Pii. V. ann. 819, § xiv.).

[2] Placuit ut adversus absentes non judicetur. Quod si factus fuerit prolata sententia non valebit.—Capit. Lib. V. § cccxi.

local dignitaries seized upon their fiefs and made them hereditary, so they arrogated to themselves the dispensation of justice which had formerly belonged to the central power, but their courts were still open to all. Trials were conducted in public upon well-known rules of local law and custom; the fullest opportunities were given for the defence; and a denial of justice authorized the vassal to renounce the jurisdiction of his feudal lord and seek a superior court.[1]

Still, as under the Merovingians, torture, though unrecognized by law, was occasionally employed as an extraordinary element of judicial investigation, as well as a means of punishment to gratify the vengeance of the irresponsible and cruel tyrants who ruled with absolute sway over their petty lordships. A few such instances occur in the documents and chronicles of the period, but the terms in which they are alluded to show that they were regarded as irregular.

Thus, it is related of Wenceslas, Duke of Bohemia, in the early part of the tenth century, that he destroyed the gibbets and fearful instruments of torture wherewith the cruelty of his judges had been exercised, and that he never allowed them to be restored.[2] An individual case of torture which occurred in 1017 has chanced to be preserved to us by its ending in a miracle, and being the occasion of the canonization of a saint. A pious pilgrim, reputed to belong to the royal blood of Scotland, while wandering on the marches between the Bavarians and the Moravians, was seized by the inhabitants on suspicion of being a spy, and, to extort a confession, was exposed to a succession of torments which ended

[1] This right of appeal was not relished by the seigneurs, who apparently foresaw that it might eventually become the instrument of their destruction. It was long in establishing itself, and was resisted energetically. Thus the Kings of England who were Dukes of Aquitaine, sometimes discouraged the appeals of their French subjects to the courts of the King of France by hanging the notaries who undertook to draw up the requisite papers.—Meyer, Instit. Judiciaires, I. 461.

[2] Annalist. Saxo ann. 928.

in hanging him on a withered tree until he died. The falsity of the accusation and the sanctity of the victim were manifested by the uninterrupted growth of his hair and nails and the constant flowing of blood from a wound, while the dead tree suddenly put forth leaves and flowers. Margrave Henry of Bavaria had him reverently buried, and he was duly enrolled in the catalogue of saints.[1] A letter of Gerard, Bishop of Cambrai, in 1025, relating how certain suspected heretics could not be forced by torment to confession, shows that ecclesiastics already were prepared, in spite of the received dogmas of the Church, to have recourse to such means when no others could be found to protect the purity of the faith.[2] In the celebrated case, also, of the robbery of the church of Laon, about the year 1100, the suspected thief, after conviction by the cold water ordeal, was tortured by command of the bishop in order to make him surrender the sacred vessels which he had concealed. Basting with hot lard was tried unsuccessfully; he was then hanged by the neck and let down at intervals for nearly a whole day, and when life was almost extinct his resolution gave way and he agreed to discover the place where the valuables were hidden.[3] When Charles the Good of Flanders was murdered in 1127, one of the assassins fled to Terouane, where he was discovered and forced by scourging to disclose the names of his accomplices.[4] About 1130 at Petersberg, in Saxony, we are told of a shepherd tortured by his lord to extract money, and saved from suffering by an earnest prayer to St. Peter.[5] When Richard I. of

[1] Dithmari Chron. Lib. VII. ad. fin.

[2] Multa dissimulatione renitebant, adeo ut nullis suppliciis possent cogi ad confessionem.—Synod. Atrebatens. ann. 1025 (Hartzheim III. 68).

[3] Hermannus de S. Mariæ Lauden. Mirac. Cf. Guibert. Noviogent. de Vita Sua. cap. xvi.

[4] "Cumque captum eduxissit Isaac, virgis et vinculis coactum et flagellatum constringit, et ita extorsit ab eo ut reos in comitis traditione proderet."—Galberti Vit. Caroli Boni cap. ix. n. 66.

[5] Chron. Montis Sereni (Mencken. Script. Rer. Germ. II. 172).

England was endeavoring to return through Germany from the crusade, it was by the torture of his page that the identity of the royal traveller was discovered, and he was delivered to his enemy the Duke of Austria.[1]

These are evidently rather sporadic and exceptional cases than indications of any systematic introduction of the practice. A more significant allusion, however, is found in the reproof administered, about 1125, by Hildebert, Bishop of le Mans, to one of his priests, who had been concerned in the torture of a suspected thief, for the purpose of extracting a confession. Hildebert argues that the infliction of torture for confession is a matter for judicial decision and not of Church discipline, and therefore not fit for a clerk to be engaged in.[2] This would seem to show that it occasionally was a recognized means of proof in the lay tribunals of the period, though as yet not favored by the Church. If so, no record of its introduction or evidence of its customary use has been preserved to us, though there is abundant evidence of its employment as a punishment and for the extortion of money.

As a punishment legally inflicted, we find it prescribed, in 1168, by Frederic Barbarossa in cases of petty thefts,[3] and in the next century by Frederic II. as a penalty for high treason.[4] Special cases, too, may be instanced, where its infliction on a large scale shows that the minds of men were not unfamiliar with its use. Thus when, in 1125, the inhabitants of Erfurt were guilty of some outrages on the imperial authority, and the town was besieged and captured by the Emperor Lothair, the chronicler relates that large numbers of the citizens were either killed, blinded, or tortured in various ways by the vindictive conqueror,[5] and in 1129 he treated the citizens of Halle in the same manner.[6]

[1] Radulf. de Coggeshale Chron. Anglic. ann. 1192.

[2] Hildebert. Cenoman. Epist. xxx.

[3] Feudor. Lib. II. Tit. xxvii. § 8.

[4] Fred. II. Lib. Rescript. II. §§ 1, 6. (Goldast. Constit. Imp. II. 54).

[5] Erphurdianus Variloquus, ann. 1125.

[6] Annal. Bosovienses, ann. 1129.

Even towards the close of the thirteenth century, we find Rodolph of Hapsburg interfering in favor of a prisoner whom one of his nobles was afflicting with cruel torments. The Emperor, however, does not venture to command, but merely entreats that the tortures be suspended until he shall have an interview with the aggressor.[1]

So summary and effective a mode of forcing the weak and unprotected to ransom themselves was not likely to be overlooked in those ages of violence, and though the extra-judicial use of torture is foreign to our purpose, yet, as showing how men educated themselves in its employment, it may be worth while to allude briefly to this aspect of the subject. Thus, Duke Swantopluck of Bohemia, in a marauding expedition into Hungary in 1108, caused to be racked or put to death all prisoners who could not purchase escape by heavy ransoms.[2] At the same period, Germany is described to us by an eye-witness as covered with feudal chieftains who lived a life of luxury by torturing the miserable wretches that could scarce obtain bread and water for their own existence.[3] In Spain, the same means were understood and employed by the savage nobles of that barbarous period.[4] In England, the fearful anarchy which prevailed under King Stephen encouraged a similar condition of affairs. The baronial castles which then multiplied so rapidly became mere dens of robbers who ransacked the country for all who had the unfortunate reputation of wealth. From these they extracted the last penny by tortures; and the chronicler expatiates on the multiplicity and horrid ingenuity of the torments devised—suspension by the feet over slow fires; hanging by the thumbs; knotted ropes twisted around the head; crucet-houses, or chests filled with

[1] Cod. Epist. Rudolphi I. p. 216–7 (Lipsiæ, 1806).

[2] Cosmæ Pragens. Lib. III. ann. 1108.

[3] Annalist. Saxo ann. 1123. See also, about the same date, the Chron. S. Trudon. Lib. XII. (D'Achery II. 704); and the Epist. Friderici Episc. Leodiens. in Martene, Ampliss. Collect. I. 654.

[4] Gerardi Hist. Compostellan. Lib. II. cap. 80.

sharp stones, in which the victim was crushed; sachentages, or frames with a sharp iron collar preventing the wearer from sitting, lying, or sleeping; dungeons filled with toads and adders; slow starvation, &c. &c.[1] Even in the more settled times of the close of the reign of Henry II. a case is recorded of a heavy fine inflicted on a man for illegally capturing and torturing a woman;[2] under Richard I. an epistle of Clement III. refers to a knight who had confessed that he had tortured a priest and forced him to redeem himself with a large sum of money;[3] and in 1210 King John seized all the Jews in England and tortured them until they ransomed themselves heavily.[4]

In all this, however, there is no evidence of the revival of torture as a means of legal investigation. The community was satisfied with the old barbaric forms of trial, and the Church, still true to its humanizing instincts, lost no opportunity of placing the seal of its disapprobation on the whole theory of extorting confessions. At an early period, it had even been a matter of dispute whether a Christian magistrate, after baptism, was at liberty to inflict torment and pronounce sentence of death. The Synod of Rome in 384 had declared that no Christian could exercise secular power without sin, because he was obliged to contravene the teachings of the Church by ordering the application of torture in judicial pleadings;[5] and if Innocent I., in 405, had decided that such proceedings were lawful, it was only on the ground that the Church had no right to resist the laws or to oppose the powers ordained of God.[6] About the same time St. Augustin had exposed the cruel absurdity of torture with a cogent terseness that has rarely been excelled, and had stamped it with the

[1] Anglo Saxon Chronicle, ann. 1137.

[2] Pike, History of Crime in England, I. 427.

[3] Jaffé Regesta p. 884.

[4] Matt. Paris. Hist. Ang. ann. 1210.

[5] Synod. Roman. ann. 384, can. 10.

[6] Innocent PP. I. Epist. III. cap. iii.

infamy which it deserved.[1] The great name of Gregory I. was on record in the sixth century, denouncing as worthless a confession extorted by incarceration and hunger.[2] When Nicholas I., who did so much to build up ecclesiastical power and influence, addressed, in 866, his well-known epistle to the Bulgarians to aid and direct them in their conversion to orthodoxy, he recites that he is told that, in cases of suspected theft, their courts endeavor to extort confession by stripes, and by pricking with a pointed iron. This he pronounces to be contrary to all law, human and divine, for confessions to be valid should be spontaneous; and he argues at some length on the uncertainty of the system of torture, and the injustice to which it leads, concluding with a peremptory prohibition of its continuance.[3]

In the first half of the same century, the manufacturers of the False Decretals had attributed to Alexander I. an epistle designed to protect the Church from pillage and oppression, in which that pontiff is made to threaten with infamy and excommunication those who extort confessions or other writings from ecclesiastics by force or fear, and to lay down the general rule that confessions must be voluntary and not compulsory.[4] On the authority of this, Ivo of Chartres, at the commencement of the twelfth century, declares that men in holy orders cannot be forced to confess;[5] and half a century later, Gratian lays down the more general as well as more explicit rule that no confession is to be extorted by the instrumentality of torture.[6] This position was consistently maintained until the revival of the Roman law familiarized the

[1] De Civ. Dei Lib. XIX. cap. vi.

[2] Gregor. PP. I. Lib. VIII. Epist. xxx.

[3] Nicolai PP. I. Epist. xcvii. § 86.

[4] Pseudo-Alexand. decret. "Omnibus orthodoxis."

[5] Ministrorum confessio nŏn sit extorta sed spontanea.—Ivon. Panorm. IV. cxvii.

[6] Quod vero confessio cruciatibus extorquenda non est.—C. I Decreti Caus. XV. q. vi.

minds of men with the procedures of the imperial jurisprudence, when the policy of the Church altered, and it yielded to the temptation of obtaining so useful a means of reaching and proving the otherwise impalpable crime of heresy.

CHAPTER VI.

REAPPEARANCE OF TORTURE.

The latter half of the twelfth century saw the study of the civil law prosecuted with intense ardor, and, in the beginning of the thirteenth, Innocent III. struck a fatal blow at the barbaric systems of the ordeal and sacramental compurgation by forbidding the rites of the Church to the one and altering the form of oath customary to the other. The unreasoning faith which had reposed confidence in the boiling caldron, or the burning ploughshare, or the trained champion as the special vehicle of Divine judgment, was fading before the Aristotelian logic of the schools, and dialectical skill could not but note the absurdity of acquitting a culprit because he could beg or buy two, or five, or eleven men to swear to their belief in his oath or denial.

Yet with all these influences at work, the ancestral customs maintained their ground long and stubbornly. It is not until the latter half of the thirteenth century that the first faint traces of legalized torture are to be found in France, at whose University of Paris for more than a hundred years the study of the Pandects had become the absorbing topic, and where the constantly increasing power of the crown found its most valuable instruments in the civil lawyers, and its surest weapon against feudalism in the extension of the royal jurisdiction. In Germany, the progress was even slower. The decline of the central authority, after the death of Frederic Barbarossa, rendered any general change impossible, and made the absolutist principles of the imperial jurisprudence especially dis-

tasteful to the crowd of feudal sovereigns, whose privileges were best supported by perpetuating organized anarchy. The early codes, therefore, the Sachsenspiegel, the Schwabenspiegel, the Kayser-Recht, and the Richstich Landrecht, which embodied the judicial proceedings of the Teutonic nations from the thirteenth to the fifteenth centuries, seem to know no other mode of deciding doubtful questions than sacramental purgation and the various forms of ordeal. During the latter portion of this period, it is true, torture begins to appear, but it is an innovation.[1]

The first indications of the modern use of torture show distinctly that its origin is derived from the civil law. In the Latin Kingdoms of the East, the Teutonic races were brought into contact with the remains of the old civilization, impressive even in its decrepitude. It was natural that, in governing the motley collection of Greeks, Syrians, and Franks, for whom they had to legislate, they should adopt some of the institutions which they found in force amid their new possessions, and it is only surprising that torture did not form a more prominent feature in their code. The earliest extant text of the *Assises de Jerusalem* is not older than the thirteenth century,

[1] Cæsarius of Heisterbach, writing in 1221, gives a story of an occurrence happening in 1184 which, if not embellished by some later transcriber, would seem to indicate that the judicial use of torture was known at an earlier period than is stated in the text. A young girl, in the disguise of a man, was despatched with letters to Lucius III. by the partisans of Wolmar in his struggle with Rudolph for the bishopric of Trèves. Near Augsburg she was joined by a robber, who, hearing his pursuers approaching, gave her his bag to hold while he retired on some pretext to a thicket. Captured with the stolen property she was condemned, but she told her story to a priest in confession, the wood was surrounded and the robber captured. He was tortured until he confessed the crime. Then he retracted, and the question between the two was settled, at the suggestion of the priest, by the ordeal of hot iron, when the robber's hand was burnt, and the girl's uninjured. The tale is a long one, very romantic in its details, and may very probably have been ornamented by successive scribes.—Cæsar. Heisterb. Dial. Mirac. Dist. I. c. xl.

and the blundering and hesitating way in which it recognizes, in a single instance, the use of torture shows how novel was the idea of such procedure to the feudal barons, and how little they understood the principles governing its application. When a murderer was caught in the act by two witnesses, he could be promptly hanged on their testimony, if they were strangers to the victim. If, however, they were relatives, their testimony was held suspect, and the confession of the accused was requisite to his conviction. To obtain this, he was subjected to torture for three days; if he confessed, he was hanged; if obdurate, he was imprisoned for a year and a day, with the privilege of clearing himself during that period by the ordeal of the red-hot iron. If he declined this, and if during his confinement no additional evidence was procured, he was acquitted, and could not be again appealed for the murder.[1]

This shows the transition state of the question. The criminal is caught with the red hand and the evidence of guilt is complete, save that the witnesses may be interested; confession thus becomes requisite, yet the failure to extort it by prolonged torment does not clear the accused; the ordeal is resorted to in order to supplement the torture, and solve the doubts which the latter could not remove; and finally, the criminal is absolved, though he dare not trust the judgment of God, and though the uncertainties in which torture had left the case are not removed.

Italy was the centre from which radiated the influences of the Roman law throughout Western Europe, and, as might be expected, it is to Italy that we must look for the earliest incorporation of torture in the procedures of modern criminal jurisprudence. The Veronese laws in force in 1228 already show a mixture of proceedings suggestive, like the Assises de Jerusalem, of the impending change. In doubtful cases, the podestà was empowered to ascertain the truth of testimony by

[1] Assises de Jerusalem, Baisse Court, cap. cclix.

either inquest, torture, or the duel.[1] This shows that the employment of torture was by this time recognized to some extent, though as the code is a very full one and this is the only allusion to it, it evidently had not yet grown into one of the regular legal processes. So in the legislation of Frederic II. for his Neapolitan provinces, promulgated in 1231, the mode in which it is prescribed shows that it was as yet but sparingly employed. As Frederic was one of the earliest secular legislators who discountenanced and restricted the various forms of the ordeal, it was natural that, with his education and temperament, he should seek to replace them with the system of the Roman codes which he so much admired.

When a secret murder or other heinous crime was committed, and the most stringent investigation could not convict the perpetrators, if the weight of suspicion fell on persons of humble station and little consequence, they could be tortured for confession. If no torment could wring from them an acknowledgment of guilt, or if, as often happened ("prout accidere novimus in plerisque"), their resolution gave way under insufferable torment and they subsequently recanted, then the punishment, in the shape of a fine, was inflicted on the district where the crime had occurred.[2] From this it is evident that torture was not exactly a novelty, but that as yet it was only ventured upon with the lowest and most unprotected class of society, and that confession during its infliction was not regarded as sufficient for conviction, unless subsequently ratified.

During the remainder of the century, the statutes of many of the Italian cities show the gradual introduction of torture to replace the barbarian processes which were not indigenous,[3] and which the traditional hate of the Italian States for

[1] Lib. Juris Civilis Veronæ cap. 75 (p. 61).

[2] Constit. Sicular. Lib. I. Tit. xxvii.

[3] Du Boys, Droit Criminel des Peup. Mod. II. 405.

the Tedeschi was not likely to render popular. That by the middle of the century, indeed, the practical applications of torture had been profoundly studied and were thoroughly understood in all their most inhuman ramifications is sufficiently evident from the accounts which we possess of the fearful cruelties habitually practised by petty despots such as Eccelino da Romano.[1]

The manner in which the use of torture thus in time was superimposed upon the existing customs of Europe is clearly shown in the law of Lubeck. The mercantile law of the Middle Ages disregarded, as we have seen, all the irregular forms of evidence, such as the ordeal, the judicial duel, &c., and it naturally was not favorable to torture. As the chief of the Hanse-towns Lubeck, therefore, in its legislation preserved the principles of the mercantile law, but in time these came to be expounded by a race of lawyers imbued with the ideas of the imperial jurisprudence, and little was left of the primitive simplicity of the original code. Thus the latter, when treating of adultery, simply provides that the accused must clear himself by oath, or be held guilty of the charge; but a commentary on it, written in 1664, assumes that as the crime is a peculiarly secret one recourse must be at once had to torture where there is colorable ground for suspicion.[2]

About this time we also find, in the increasing rigor and gradual systematizing of the Inquisition, an evidence of the growing disposition to resort to torture, and a powerful element in extending and facilitating its introduction. The Church had been actively engaged in discountenancing and

[1] Monach. Paduan. Chron. Lib. II. ann. 1252–3 (Urstisii Script. Rer. German. p. 594).—Quotidie diversis generibus tormentorum indifferenter tam majores quam minores a carnificibus necabuntur. Voces terribiles clamantum in tormentis die noctuque audiebantur de altis palatiis. . . . Quotidie sine labore, sine conscientiæ remorsione magna tormenta et inexogitata corporibus hominum infligebat, etc.

[2] Mevii Comment. in Jus Lubecense, Lib. IV. Tit. vi. Art. 4 (Francofurt. 1664).

extirpating the ordeal, and it now threw the immense weight of its authority in favor of the new process of extorting confessions. When Frederic II., from 1220 to 1239, published his three constitutions directed against heresy, cruel and unsparing as they were, they contained no indication that torture was even contemplated as a mode of investigation. In conformity with the provisions of the Lateran Council of 1215, parties suspected on insufficient evidence were directed to prove their innocence by some fitting mode of purgation, and the same instructions were given by Gregory IX. in 1235.[1] In 1252, however, when Innocent IV. issued his elaborate directions for the guidance of the Inquisition in Tuscany and Lombardy, he ordered the civil magistrates to extort from all heretics by torture not merely a confession of their own guilt, but an accusation of all who might be their accomplices; and this derives additional significance from his reference to similar proceedings as customary in trials of thieves and robbers.[2] It shows the progress made during the quarter of the century and the high appreciation entertained by the Church for the convenience of the new system.

At first the canons of the Church, which prohibited ecclesiastics from being concerned in such matters, or even from being present, under pain of "irregularity," rendered it necessary for inquisitors to call in the secular executioners; but this interfered with promptness and secrecy, and the difficulty was removed with characteristic indirection. A series of papal bulls from 1256 to 1266 authorized inquisitors and

[1] Concil. Lateran. IV. can. iii.—Goldast. Constit. Imp. I. 293-5.—Harduin. Concil. VII. 164. See above, p. 89.

[2] Teneatur præterea potestas seu rector omnes hæreticos quos captos habuerit, cogere citra membri diminutionem et mortis periculum, tanquam vere latrones et homicidas animarum et fures sacramentorum Dei et fidei Christianæ, errores suos expresse fateri et accusare alios hæreticos quos sciunt, et bona eorum, et credentes et receptatores et defensores eorum, sicut coguntur fures et latrones rerum temporalium accusare suos complices et fateri maleficia quæ fecerunt.—Innocent IV. Bull. *Ad extirpanda* § 26.

their assistants to grant mutual absolution and dispensation for irregularities,[1] and thus they were able to take the business of inflicting torture into their own hands—an opportunity of which they availed themselves fully.

As yet, however, this did not extend beyond Italy. There is extant a tract, written not long after this time, containing very minute instructions as to the established mode of dealing with the Waldensian sectaries known as the "Poor Men of Lyons." It gives directions to break down their strength and overcome their fortitude by solitary confinement, starvation, and terror, but it abstains from recommending the infliction of absolute and direct torture, while its details are so full that the omission is fair negative evidence that such measures were not then customary.[2]

The whole system of the Inquisition, however, was such as to render the resort to torture inevitable. Its proceedings were secret; the prisoner was carefully kept in ignorance of the exact charges against him, and of the evidence upon which they were based. He was presumed to be guilty, and his judges bent all their energies to force him to confess. To accomplish this, no means were too base or too cruel. According to the tract just quoted, pretended sympathizers were to be let into his dungeon, whose affected friendship might entrap him into an unwary admission; officials armed with fictitious evidence were directed to frighten him with assertions of the testimony obtained against him from supposititious witnesses; and no resources of fraud or guile were to be spared in overcoming the caution and resolution of the poor wretch whose mind, as we have seen, had been carefully weakened by solitude, suffering, hunger, and terror. From this to the rack and estrapade the step was easily taken, and was not

[1] Alex. P. P. IV. Bull. *Ut negotium*, 7 Julii, 1256 (MSS. Doat, XXXI. 196).—Ripoll. Bullar. Ord. Prædic. I. 430.—Mag. Bullar. Roman. I. 132.

[2] Trac. de Hæres. Paup. de Lugd. (Martene Thesaur. V. 1787). In the tract, Frederic II., who died in 1250, is spoken of as "quondam imperator."

long delayed. In 1301, we find even Philippe le Bel protesting against the cruelty of Fulk, the Dominican Inquisitor, and interfering to protect his subjects from the refinements of torture to which, on simple suspicion of heresy, unfortunate victims were habitually exposed.[1] Yet when, a few years later, the same monarch resolved upon the destruction of the Templars, he made the Inquisition the facile instrument to which he resorted, as a matter of course, to extort from De Molay and his knights, with endless repetition of torments, the confessions from which he hoped to recruit his exhausted treasury with their broad lands and accumulated riches.[2]

The history of the Inquisition, however, is too large a subject to be treated here in detail, and it can only be alluded to for the purpose of indicating its influence upon secular law. That influence was immense. The legists who were endeavoring to eradicate the feudal customs could not expect the community to share their admiration of the Roman law, and naturally grasped with eagerness the advantage offered them in adducing the example of ecclesiastical institutions. In founding their new system they could thus hardly avoid copying that which presented itself under all the authority of an infallible Church, and which had been found to work so successfully in unveiling the most secret of hidden crimes, those of faith and belief.[3] When, therefore, men were taught

[1] Clamor validus et insinuatio luctuosa fidelium subditorum . . . processus suos in inquisitionis negotio a captionibus, quæstionibus et excogitatis tormentis incipiens personas quas pro libito asserit hæretica labe notatas, abnegasse Christum . . . . vi vel metu tormentorum fateri compellit.—Lit. Philip. Pulchri (Vaissette, Hist. Gén. de Languedoc, T. IV. Preuves p. 118).

[2] The fearful details of torture collected by Raynouard (Mon. Hist. rel. à la Condamnation des Chev. du Temple) show that the Inquisition by this time was fully experienced in such work.

[3] Simancæ de Christ. Instit. Tit. LXV. No. 19.—To the Inquisition is likewise attributable another of the monstrous iniquities of criminal justice—the denial to the accused of the assistance of counsel. Under the customary law of the feudal courts, the avocat or "avantparlier" was freely admitted,

that in these cases the ordinary forms and safeguards of the law were not to stand in the way of the public good, a principle was enunciated capable of illimitable development.

About the time when Innocent IV. was prescribing torture in Italy, we find the first evidence of its authoritative use in France as an ordinary legal procedure. In December, 1254, an assembly of the nobles of the realm at Paris adopted an ordonnance regulating many points in the administration of justice. Among these occurs an order that persons of good reputation, even though poor, shall not be put to the torture on the evidence of one witness, lest, on the one hand, they may be forced to convict themselves falsely, or, on the other, to buy themselves off from the infliction.[1]

This would seem to indicate that the system of judicial torture was so completely established that its evils and abuses had begun to render themselves apparent and to require restrictive legislation. Yet the contemporaneous remains of jurisprudence show no trace of the custom, and some of them are of a nature to render their silence a negative proof of no little weight. To this period, for instance, belongs the earliest extant coutumier of Normandy, published by Ludewig, and it contains no allusion to torture. The same may be said of the *For de Béarn*,

but such privilege was incompatible with the arbitrary process of which the sole object was to condemn for a crime scarce susceptible of proof. The decretal against heretics issued in 1235 by Gregory IX. forbids all judges, advocates, and notaries from helping the suspected heretic under pain of perpetual deprivation of function—"Item, judices, advocati, et notarii nulli eorum officium suum impendant; alioquin eodem officio perpetuo sint privati" (Harduin. Concil. VII. 164); and the same rule was enjoined "ne "Inquisitionis negotium per advocatorum strepitum retardetur" by the Council of Valence (can. xi.) in 1248 and that of Alby (can. xxiii.) in 1254 (Harduin. VII. 426, 461).

[1] Personas autem honestas vel bonæ famæ, etiam si sint pauperes, ad dictum testis unici, tormentis seu quæstionibus inhibemus, ne ob metum falsum confiteri, vel suam vexationem redimere compellantur.—Fontanon, Edicts et Ordonn. I. 701.—A somewhat different reading is given by Isambert, Anciennes Loix Françaises I. 270.

granted in 1288, and recently printed by MM. Mazure and Hatoulet, which is very full in its details of judicial procedure. The collection of the laws of St. Louis, known as the *Établissements*, is likewise free from any instructions or directions as to its application, though it could scarcely have been omitted had it formed part of the admitted jurisprudence of the age. It may be argued, indeed, that these codes and laws assume the existence of torture, and therefore make no reference to it, but such an argument would not hold good with respect to the books of practice which shrewd and experienced lawyers commenced at that time to draw up for the guidance of courts in the unsettled period of conflict between the ancient feudal customs and the invading civil law. For instance, no text-book can well be more minute than the *Livres de Jostice et de Plet*, written about the year 1260, by a lawyer of the school of Orleans, then celebrated as the headquarters of the study of the imperial jurisprudence. He manifests upon almost every page his familiar acquaintance with the civil and canon law, and he could not possibly have avoided some reference to torture if it had been even an occasional resource in the tribunals in which he pleaded, and yet he does not in any way allude to it.

The same conclusion is derivable from the *Coutumes du Beauvoisis*, written about 1270 by Philippe de Beaumanoir. In his position as royal bailli, Beaumanoir had obtained the fullest possible familiarity with all the practical secular jurisprudence of his day, and his tendencies were naturally in favor of the new system with which St. Louis was endeavoring to break down the feudal customs. Yet, while he details at much length every step in all the cases, civil and criminal, that could be brought into Court, he makes no allusion to torture as a means of obtaining evidence. In one passage, it is true, he seems to indicate that a prisoner could be forced, while in prison, to criminate himself, but the terms employed prove clearly that this was not intended to include the

administration of torment.[1] In another place, moreover, when treating of robberies, he directs that all suspected parties should be long and closely confined, but that, if they cannot be convicted by external evidence, they must at last be discharged.[2] All this is clearly incompatible with the theory of torture.

The *Conseil* of Pierre de Fontaines, which was probably written about the year 1260, affords the same negative evidence in its full instructions for all the legal proceedings then in use. In these three works, notwithstanding the reforms attempted by St. Louis, the legist seems to imagine no other solution than the wager of battle for the settlement of doubtful cases, wherein testimony is insufficient. The form of trial is still public, in the feudal or royal courts, and every opportunity is given both for the attack and the defence. The work of de Fontaines, moreover, happens to furnish another proof that he wrote at the commencement of a transition period, during which the use of torture was introduced. In the oldest MSS. of his work, which are considered to date from 1260 to 1280, there is a passage to the effect that a man convicted of crime may appeal, if he has not confessed, or, when he has confessed, if it has been in consequence of some understanding (*covent*). In later MSS., transcribed in the early part of the fourteenth century, the word "covent"

[1] Cil qui est pris et mis en prison, soit por meffet ou por dete, tant comme il est en prison il n'est tenus à respondre à riens c'on li demande fors es cas tant solement por quoi il fu pris. Et s'on li fet respondre autre coze contre se volenté, et sor ce qu'il allige qu'il ne veut pas respondre tant comme il soit en prison; tout ce qui est fait contre li est de nule valeur, car il pot tout rapeler quand il est hors de prison.—Beaumanoir, cap. LII. § XIX.

[2] Quant tel larrecin sunt fet, le justice doit penre toz les souspeçonneus et fere moult de demandes, por savoir s'il porra fere cler ce qui est orbe. Et bien les doit en longe prison tenir et destroite, et toz cex qu'il ara souspechonneus par malvese renommée. El si'l ne pot en nule maniere savoir le verité du fet, il les doit delivrer, se nus ne vient avant qui partie se voille fere d'aus acuser droitement du larrecin.—Ibid. cap. XXXI. § VI.

is replaced by "tourmenz,"[1] thus showing not only the introduction of torture during the interval, but also that a conviction obtained by it was not final.

The Ordonnance of 1254, indeed, as far as it relates to torture, is asserted by modern criticism to have been applicable only to Languedoc.[2] If so, its importance is reduced to a minimum, for in the document as registered in the council of Béziers in 1255, the section respecting torture is omitted,[3] and this would seem to show that even in the south, where the traditions of the Roman law were continuous, torture was still regarded as an innovation not to be legally sanctioned. Still it was gradually winning its way against popular repugnance, for we have in 1260 a charter from Alphonse de Poitiers to the town of Auzon (Auvergne), in which he grants exemption from torture in all trials irrespective of the gravity of the crime.[4]

While giving due weight, however, to all this, we must not lose sight of the fact that the laws and regulations prescribed in royal ordonnances and legal text-books were practically applicable only to a portion of the population. All non-nobles, who had not succeeded in extorting special privileges by charter from their feudal superiors, were exposed to the caprices of barbarous and irresponsible power. It was a maxim of feudal law that God alone could intervene between the lord and his villein—"Mès par notre usage n'a-il, entre toi et ton vilein, juge fors Deu"[5]—the villein being by no

[1] Si li hons n'est connoissans de son mesfet, ou s'il l'a coneu et ce a esté par covent, s'en li fait jugement, apeler en puet.—Conseil, ch. xxii. art. 28 (Édition Marnier, Paris, 1846).

[2] Tanon, Registre Criminel de la justice de S. Martin-des-Champs, Introd. p. lxxxvi. (Paris, 1877); Vaissette, Ed. Privat, VIII. 1348.—L'Oiseleur (Les Crimes et les Peines, Paris, 1863, p. 113) says that it was enacted for the baillages of Beauvais and Cahors, but we have seen from Beaumanoir that torture was not used in the Beauvoisis.

[3] Baluz. Concil. Gall. Narbon. p. 75.

[4] Chassaing, Spicilegium Brivatense, p. 92.

[5] Conseil ch. xxi. art. 8.

means necessarily a serf; and another rule prohibited absolutely the villein from appealing from the judgment of his lord.[1] Outside of law, and unauthorized by coutumiers and ordonnances, there must, under such institutions, have been habitually vast numbers of cases in which the impatient temper of the lord would seek a solution of doubtful matters, in the potent cogency of the rack or scourge, rather than waste time or dignity in endeavoring to cross-question the truth out of a quick-witted criminal.

Still, as an admitted legal procedure, the introduction of torture was very gradual. The *Olim*, or register of cases decided by the Parlement of Paris, extends, with some intervals, from 1255 to 1318, and the paucity of affairs recorded in which torture was used shows that it could not have been habitually resorted to during this period. The first instance, indeed, only occurs in 1283, when the Bishop of Amiens complains of the bailli of that town for having tried and tortured three clerks in defiance of the benefit of clergy which entitled them to exemption from secular jurisdiction. The bailli pleaded ignorance of their ecclesiastical character, and his plea was admitted as sufficient.[2] The next instance of the use of torture is found in 1299, when the royal bailli of Senlis cites the mayor and jurats of that town before the Parlement, because in a case of theft they had applied the question to a suspected criminal; and although theft was within their competence, the bailli argued that torture was an incident of "haute justice" which the town did not possess. The decision was in favor of the municipality.[3] The next year (1300) we find a clerk, wearing habit and tonsure, complaining that the royal officials of the town of Villeneuve in Rouergue had tortured him in divers ways, with ropes and heavy weights, heated eggs and fire, so that he was crippled,

[1] Fontaines, Conseil, art. 14. Et encor ne puisse li vileins fausser le jugement son seignor.

[2] Actes du Parlement de Paris, I. 382 (Paris, 1863).

[3] Olim. T. II. p. 451.

and had been forced to expend three hundred livres Tournois in medicines and physicians. This, with other proper damages, he prays may be made good to him by the perpetrators, and the arrêt of the Parlement orders their persons and property to be seized, and their possessions valued, in order that the amount may be properly assessed among them.[1] Philippe le Bel, notwithstanding his mortal quarrel with the papacy—or perhaps in consequence of it—was ever careful of the rights and privileges of the clergy, among which the immunity from secular jurisdiction and consequently from torture was prominent. The case evidently turned upon that point.

The fourth case does not present itself until 1306. Two Jews, under accusation of larceny by their brethren, complain that they had been illegally tortured by the bailii of Bourges, and though one of them under the infliction had confessed to complicity, the confession is retracted and damages of three thousand livres Tournois are demanded. On the other hand, the bailli maintains that his proceedings are legal, and asks to have the complainants punished in accordance with the confession. The Parlement adopts a middle course; it acquits the Jews and awards no damages, showing that the torture was legal and a retracted confession valueless.[2]

The fifth case, which occurs in 1307, is interesting as having for its reporter no less a personage than Guillaume de Nogaret, the captor of Boniface VIII. A certain Guillot de Ferrières, on a charge of robbery, had been tried by the judge of Villelongue and Nicolas Bourges, royal chatelain of Mont-Ogier. The latter had tortured him repeatedly and cruelly, so that he was permanently crippled, and his uncle, Étienne de Ferrières, Chatelain of Montauban, claims damages. The decision condemns Nicolas Bourges in a mulct of one thousand livres Tournois, half to Guillot for his sufferings and half to Étienne for his expenses, besides a fine to the

[1] Olim. III. 49-50.

[2] Ibid. III. 185-6.

crown.[1] It is evident that judges were not allowed to inflict unlimited torment at their pleasure.

The sixth case, occurring in 1310, may be passed over, as the torture was not judicial, but merely a brutal outrage by a knight on a noble damsel who resisted his importunities: though it may be mentioned that of the fine inflicted on him, fifteen hundred livres Tournois enured to the crown and only one hundred to the victim.[2]

The seventh case took place in 1312, when Michael de Poolay, accused of stealing a sum of money from Nicolas Loquetier, of Rouen, was subjected to a long imprisonment and torture at Château-Neuf de Lincourt, and was then brought to the Châtelet at Paris, where he was again examined without confession or conviction. Meanwhile, the real criminal confessed the theft, and Nicolas applies to the Parlement for the liberation of Michael, which is duly granted.[3]

A long interval then occurs, and we do not hear of torture again until 1318, when Guillaume Nivard, a money-changer of Paris, was accused of coining, and was tortured by the Prevôt of the Châtelet. He contends that it was illegal, while the Prevôt asserts that his jurisdiction empowered him to administer it. The Parlement investigates the case, and acquits the prisoner, but awards him no damages.[4]

The essentially commonplace and trivial character of these cases has its interest in showing that the practice of appealing to the Parlement was not confined to weighty matters, and therefore that the few instances in which torture was involved in such appeals afford a fair index of the rarity of its use during this period. These cases, too, have seemed to me worth reciting, as they illustrate the principles upon which its application was based in the new jurisprudence, and the tentative and uncertain character of the progress by which the primitive customs of the European races were gradually becoming supplanted by the resuscitated Roman law.

[1] Olim. III. 221–2.
[2] Ibid. III. 505–6.
[3] Ibid. III. 751–2.
[4] Ibid. III. 1299.

A few instances, moreover, are on record in which torture was used in affairs of state. Thus in 1304 we find Charles of Valois torturing a Flemish beguine who was accused of an attempt to poison him. The mode adopted was the application of fire to the soles of the victim's feet, and though she was said to have confessed, still he liberated her after a short imprisonment.[1] In the frightful scandal, also, of the daughters-in-law of Philippe le Bel, which occurred in 1314, though torture does not seem to have been used in examining the principals, either the princesses or their paramours, it was freely employed upon the numerous persons who were accused as accessories.[2] In 1315, during the long trial of Enguerrand de Marigny, sacrificed after the death of Philippe le Bel to the hatred of Charles of Valois, torture was freely used to obtain evidence from his dependents;[3] and in the same year Raoul de Presles, accused of the death of the late king, was exposed to torture without obtaining a confession, and was finally liberated.[4]

This undermining of the ancient customs had not been allowed to continue uninterrupted by protest and resistance. In the closing days of the reign of Philippe le Bel the feudal powers of France awoke to the danger with which they were menaced by the extension of the royal prerogative during the preceding half-century. A league was formed which seemed to threaten the existence of the institutions so carefully nurtured by St. Louis and his successors. It was too late, however, and though the storm broke on the new and untried royalty of Louis Hutin, the crown lawyers were already too powerful for the united seigneurie of the kingdom. When the various provinces presented their complaints and their demands for the restoration of the old order of things, they were met with a little skilful evasion, a few artful promises, some con-

[1] Guill. de Nangis Continuat. ann. 1304.

[2] Ibid. ann. 1314. [3] Ibid. ann. 1315.

[4] Grandes Chroniques, T. V. p. 221 (Ed. Paris, 1837).

cessions which were readily withdrawn, and negatives carefully couched in language which seemed to imply assent.

Among the complaints we find the introduction of torture enumerated as an innovation upon the established rights of the subject, but the lawyers who drew up the replies of the king took care to infringe as little as they could upon a system which their legal training led them to regard as an immense improvement in procedure, especially as it enabled them to supersede the wager of battle, which they justly regarded as the most significant emblem of feudal independence.

The movement of the nobles resulted in obtaining from the king a series of charters for the several provinces, by which he defined, as vaguely, indeed, as he could, the extent of royal jurisdiction claimed, and in which he promised to relieve them from certain grievances. In some of these charters, as in those granted to Britanny, to Burgundy, and to Amiens and Vermandois, there is no allusion made to torture.[1] In the two latter, the right to the wager of battle is conceded, which may explain why the nobles of those provinces were careless to protect themselves from a process which they could so easily avoid by an appeal to the sword. In the charter of Languedoc, all that Louis would consent to grant was a special exemption to those who had enjoyed the dignity of capitoul, consul, or decurion of Toulouse and to their children, and even this trifling concession did not hold good in cases of *lèse-majesté* or other matters particularly provided for by law; the whole clause, indeed, is borrowed from the Roman law, which may have reconciled Louis's legal advisers to it, more especially as, for the first time in French jurisprudence, it recognized the crime of *lèse-majesté*, which marked the triumph of the civil over the feudal law.[2] Normandy only obtained a vague promise that no freeman should be subjected to torture unless he were the object of violent presumptions in a capital offence, and

[1] Isambert, Anciennes Loix Françaises, III. 131, 60, 65.

[2] Ordonnance, 1ier Avril, 1315, art. xix. (Ibid. III. 58).

that the torture should be so regulated as not to imperil life or limb; and though the Normans were dissatisfied with this charter, and succeeded in getting a second one some months later, they gained nothing on this point.[1]

The official documents concerning Champagne have been preserved to us more in detail. The nobles of that province complained that the royal prevôts and serjeants entered upon their lands to arrest their men and private persons, whom they then tortured in defiance of their customs and privileges ("contre leurs coustumes et libertez"). To this Louis promised to put an end. The nobles further alleged that, in contravention of the ancient usages and customs of Champagne ("contre les us et coustumes enciens de Champagne"), the royal officers presumed to torture nobles on suspicion of crime, even though not caught in the act, and without confession. To this Louis vaguely replied that for the future no nobles should be tortured, except under such presumptions as might render it proper, in law and reason, to prevent crime from remaining unpunished; and that no one should be convicted unless confession was persevered in for a sufficient time after torture.[2] This, of course, was anything but satisfactory, and the Champenois were not disposed to accept it; but all that they could obtain after another remonstrance was a simple repetition of the promise that no nobles should be tortured except under capital accusations.[3] The struggle apparently continued, for, in 1319, we find Philippe le Long, in a charter granted to Périgord and Quercy, promising that the proceedings preliminary to torture should be had in the presence of both parties, doubtless to silence complaints as to the secret character which criminal investigations were assuming.[4]

[1] Cart. Norman I. Mar. 1315, cap. xi. Cart. II. Jul. 1315, cap. xv. (Ibid. 51, 109).

[2] Ordonn. Mai 1315, art. v. xiv. (Bourdot de Richebourg, III. 233–4).

[3] Ordonn. Mars 1315, art. ix. (Ibid. p. 235). This ordonnance is incorrectly dated. It was issued towards the end of May, subsequently to the above.

[4] Ordonn. Jul. 1319, art. xxii. (Isambert, III. 227).

The use of torture was thus permanently established in the judicial machinery of France as one of the incidents in the great revolution which destroyed the feudal power. Even yet, however, it was not universal, especially where communes had the ability to preserve their franchises. Count Beugnot has published, as an appendix to the *Olim*, a collection known as the *Tout Lieu de St. Disier*, consisting of 314 decisions of doubtful cases referred by the magistrates of St. Dizier to the city of Ypres for solution, as they were bound to do by their charter. This especially directed that all cases not therein provided for should be decided according to the customs of Ypres, and consequently, for two hundred and fifty years, whenever the eschevins of the little town in Champagne felt in doubt they referred the matter to the lordly burghers of Flanders as to a court of last resort. In the *Tout Lieu* the cases date mostly from the middle third of the fourteenth century, and were selected as a series of established precedents. The fact that, throughout the whole series, torture is not alluded to in a single instance shows that it was a form of procedure unknown to the court of the eschevins of St. Dizier, and even to the superior jurisdiction of the bailli of their suzerain, the Seigneur of Dampierre. Many of these cases seem peculiarly adapted to the new inquisitorial system. Thus, in 1335, a man was attacked and wounded in the street at night. A crowd collected at his cries, and he named the assailant. No rule was more firmly established than the necessity of two impartial witnesses to justify condemnation, and the authorities of St. Dizier, not knowing what course to take, applied as usual for instructions to the magistrates of Ypres. The latter defined the law to be that the court should visit the wounded man on his sick-bed and adjure him by his salvation to tell the truth. If on this he named any one and subsequently died, the accused should be pronounced guilty; if, on the other hand, he recovered, then the accused should be treated according to his reputation: that is, if of good fame, he should

be acquitted; if of evil repute, he should be banished.[1] No case more inviting under the theory of torture could well be imagined, and yet neither the honest burghers of St. Dizier nor the powerful magnates of Ypres seem to have entertained the idea of its application. So, again, when the former inquire what proof is sufficient when a man accuses another of stealing, the answer is that no evidence will convict, unless the goods alleged to be stolen are found in the possession of the accused.[2] The wealthy city of Lille equally rejected the process of torture. The laws in force there, about the year 1350, prescribe that in cases of homicide conviction ought to be based upon absolute evidence, but where this is unattainable then the judges are allowed to decide on mere opinion and belief, for uncertain matters cannot be rendered certain.[3] In such a scheme of legislation, the extortion of a confession as a condition precedent to condemnation can evidently find no place.

Attempts to introduce torture in Aquitaine were apparently made, but they seem to have been resisted. In the Coutumier of Bordeaux, during the fourteenth century there is a significant declaration that the sages of old did not wish to deprive men of their liberties and privileges. Torture, therefore, was prohibited in the case of all citizens except those of evil repute and declared to be infamous. The nearest approach to it that was permitted was tying the hands behind the back, without using pulleys to lift the accused from the ground.[4]

[1] Tout Lieu de Saint Disier, cap. cclxxii. (Olim, T. II. Append. p. 856).

[2] Ibid. cap. cclxxiii.

[3] Roisin, Franchises, Lois et Coutumes de Lille, p. 119. Thus, "on puet et doit demander de veir et de oir," but when this is impossible, "on doit et puet bien demander et enquerre de croire et cuidier. Et sour croire et sour cuidier avoec un veritet aparent de veir et d'oir, et avoec l'omechide aparant, on puet bien jugier, lonc l'usage anchyen, car d'oscure fait oscure veritet."

[4] Rabanis, Revue Hist. de Droit, 1861, p. 515.—No volgoren los savis antiquament qu'om pergossa sa franquessa ni sa libertat.

By this time, however, places where torture was not used were exceptional. An allusion to it in 1335 in the register of the court of the Priory of St. Martin-des-Champs shows that already it was not confined to the royal jurisdiction, but that it was recognized as an incident to the possession of haute justice.[1] By a document of 1359, it appears that it was the custom to torture all malefactors brought to the Châtelet of Paris,[2] and though privileged persons constantly endeavored to exempt themselves from it, as the consuls of Villeneuve in 1371,[3] and the Seigneur d'Argenton in 1385,[4] other privileged persons as constantly sought to obtain the power of inflicting it, as shown in the charter of Milhaud, granted in 1369, wherein the consuls of that town are honored with the special grace that no torture shall be administered except in their presence, if they desire to attend.[5] At the end of the century, indeed, the right to administer torture in cases wherein the accused denied the charge was regularly established among the privileges of haute justiciers.[6]

By this time criminal procedures were fully recognized as divisible into two classes—the *procès ordinaire* and the *procès extraordinaire*. The former of these was carried on by the form of inquest, the latter by inquisition, in which torture was habitually employed. There were no definite rules to determine the class to which any given case might be referred, and though at the beginning of the fourteenth century the

[1] Registre Criminel de la Justice de St. Martin-des-Champs, p. 50.

[2] Du Cange s. v. *Quæstionarius*.

[3] Letters granting exemption from torture to the consuls of Villeneuve for any crimes committed by them were issued in 1371 (Isambert, V. 352). These favors generally excepted the case of high treason.

[4] He pleaded his rank as baron as an exemption from the torturé, but was overruled. Dumoulin, however, admits that persons of noble blood are not to be as readily exposed to it as those of lower station.—Desmaze, Les Pénalités Anciennes, d'après des Textes inédits, p. 39 (Paris, 1866).

[5] Du Cange s. v. *Quæstio* No. 3.

[6] Pour denier mettre à question et tourment.—Jean Desmarres, Décisions, Art. 295 (Du Boys, Droit Criminel II. 48).

procès ordinaire, as its name infers, was the usual mode of trying criminals, gradually the choice between the two was left to the discretion of the judge, and this discretion leaned so constantly in favor of the *procès extraordinaire* that by the close of the century it had become the rule rather than the exception.[1]

This is very clearly shown by the records of the Châtelet of Paris from 1389 to 1392,[2] which enable us to form a tolerably distinct idea of the part assigned to torture in the criminal procedure of this period. It had virtually become the main reliance of the tribunal, for the cases in which it was not employed appear to be simply exceptional. Noble blood afforded no exemption, for gentlemen were placed on the rack for petty crimes as freely as roturiers.[3] No avenue of escape was open to the miserable culprit. If he denied the alleged offence, he was tortured at once for a confession, and no settled rules seem to have existed as to the amount of evidence requisite to justify it. Thus, in one case, a man on the *tresteau* relating the misdeeds of his evil life chanced to mention the name of another as a professional thief. The latter was immediately arrested, and though there was no specific crime charged against him, he was tortured repeatedly until sufficient confession was extracted from him to justify his execution.[4] If, on the other hand, the prisoner persistently denied his guilt there was no limit to the repetition of the torture, and yet, even when no confession could be thus extracted, the failure did not always serve to exempt him

[1] L. Tanon, Registre Criminel de la Justice de S. Martin-des-Champs, Introd. p. lxxxv. (Paris, 1877).

[2] Registre Criminel du Châtelet de Paris. Publié pour la première fois par la Société des Bibliophiles Français. 2 tom. 8vo. Paris, 1864.

[3] Ibid. I. 9, 14.

[4] Ibid. I. 143. See also the similar case of Raoulin du Pré (p. 149), who recanted on the scaffold and protested his innocence "sur la mort qu'il attendoit à avoir et recevoir presentement," but who nevertheless was executed. Also that of Perrin du Quesnoy (p. 164).

from punishment.[1] If he retracted the confession extorted from him, he was tortured again and again until he ceased to assert his innocence, for it was a positive necessity for conviction that the confession under torture should be confirmed by the prisoner without constraint—"sans aucune force, paour ou contrainte de gehayne"—when sentence came to be passed upon him outside of the torture-chamber.

If, again, the luckless prisoner confessed the crime of which he stood accused, he was further promptly tortured to find out what other offences he might at some previous time have committed. This, which we will see hereafter, continued to be to the end one of the worst abuses of the torture system, was already a practice at least half a century old,[2] and it had become so habitual that it is scarcely worth while to cite particular examples, though the case of Gervaise Caussois may be briefly referred to on account of its quaintness. Arrested for stealing some iron tools, he promptly confessed the crime. Among the reasons on record for proceeding to

[1] See the case of Berthaut Lestalon (Ibid. p. 501) accused of sundry petty thefts and tortured unsuccessfully. The court decided that in view of the little value of the articles stolen and of their having been recovered by the owners, the prisoner should be tortured again, when, if he confessed, he should be hanged, and if he still denied, he should have his right ear cropped and be banished from Paris. This logical verdict was carried out. No confession was obtained, and he was punished accordingly. Somewhat similar was the case of Jehan de Warlus (Ibid. p. 157), who was punished after being tortured five times without confession; also that of Jaquet de Dun (Ibid. p. 494).

[2] In the Registre Criminel de St. Martin-des-Champs the cases are recorded with too much conciseness to give details as to the process, only the charge and the sentence being stated. It frequently happens, however, that a man convicted of some petty larceny is stated to have confessed more serious previous crimes, which necessarily implies their confession being extorted. See, for instance, the case of Jehannin Maci, arrested in 1338 for having in his possession two brass pots, the stealing of which he not only confessed but also "plusures murtres et larrecins avoir fais" for which he was duly drawn on a hurdle and hanged (*op. cit.* pp. 120–1). The case of Phelipote de Monine (p. 178) is also suggestive.

torture him in order to elicit an account of his other presumed misdemeanors, is included the excellent one, "attendu qu'il est scabieux." Under the torment the poor wretch accused himself of some other petty thefts, but even this did not satisfy his examiners, for the next day he was again brought before them and bound to the *tresteau*, when he confessed a few more trifling larcenies. Having apparently thus obtained enough evidence to satisfy their consciences, his judges mercifully hanged him without further infliction.[1] In fact, the whole matter apparently was left very much to the discretion of the court, which seems to have been bound by no troublesome limitations to its curiosity in investigating the past career of the miserable beings brought before it.

How that discretion was habitually exercised may be judged from the case of a certain Fleurant de Saint-Leu, who was brought up for examination Jan. 4, 1390, on the charge of stealing a silver buckle. Denying the accusation, he was twice tortured with increasing severity, until he confessed the alleged crime, but asserted it to be a first offence. On Jan. 8th the court decided that as the petty theft was insufficient to merit death, he should be tortured repeatedly to ascertain whether he had not been guilty of something else worthy of capital punishment. On that day he was therefore thrice exposed to the question, in an ascending scale of severity, but without success. On the 13th he was again twice tortured, when the only admission that rewarded the examiners was that three years before he had married a prostitute at Senlis. This uncommon obduracy seems to have staggered the court, for he was then kept in his dungeon until April 9th, when his case was carefully considered, and though nothing had been extorted from him since his first confession, he was condemned, and was hanged the same day—thus proving how purely gratuitous were the fearful sufferings to which he had been

[1] Registre Criminel du Châtelet de Paris, I. 36.

exposed in order to gratify the curiosity or satisfy the consciences of his remorseless judges.[1]

Few criminals, however, gave so much trouble as Fleurant. The "petit et grand tresteaux," on which the torture was customarily administered, were a sword which cut many a Gordian knot, and, by rendering the justice of the Châtelet sharp and speedy, saved the court a world of trouble. It was by no means unusual for the accused to be arraigned, tortured, condemned, and executed all on the same day,[2] and not a few of the confessions read as though they were fictions composed by the accused in order to escape by death from the interminable suffering to which they were exposed. The sameness frequently visible in a long catalogue of crimes seems to indicate this, but it is especially notable in some singular cases of parties accused of poisoning wells throughout the north of France, when there was an evident necessity for the authorities to satisfy the excited populace by procuring them some victims, and the unfortunate wretches who were arrested on suspicion were tortured until they were ready to accuse themselves of anything.[3] In one case, indeed, the prisoner stated that he had known a person

[1] Ibid. I. 201–209.—Somewhat similar was the case of Marguerite de la Pinele (Ibid. p. 322), accused of stealing a ring, which she confessed under torture. As she did not, however, give a satisfactory account of some money found upon her, though her story was partially confirmed by other evidence, she was again twice tortured. This was apparently done to gratify the curiosity of her judges, for, though no further confession was extracted from her, she was duly buried alive.

Crimes for which a man was hanged or decapitated were punished in a woman by burying or burning. Jews were executed by being hanged by the heels between two large dogs suspended by the hind legs—a frightful death, the fear of which sometimes produced conversion and baptism on the gallows (Ibid. II. 43).

[2] Ibid. I. pp. 1, 268, 289; II. 66, etc.

[3] Ibid. I. 419–475.—The same result is evident in a very curious case in which an old sorceress and a young "fille de vie" were accused of bewitching a bride and groom, the latter of whom had been madly loved by the girl (Ibid. I. p. 327).

tortured at the Châtelet with such severity that he died in the hands of his torturers, and for himself he declared, after one or two inflictions, that he would confess whatever would relieve him from a repetition of what he had endured.[1]

Yet, with all this reckless disregard of the plainest principles of justice, the torture process had not yet entirely obliterated the memory of the old customary law. The prisoner was not, as we shall see practised hereafter, kept in ignorance of the charges against him and of the adverse testimony. The accusation was always made known to him, and when witnesses were examined, the record is careful to specify that it was done in his presence.[2] The court deliberated in private, but the prisoner was brought before it to receive condemnation either to torture or to death. Facilities were likewise afforded him to procure evidence in his favor, when the swift justice of the Châtelet might allow him leisure for such defence, for his friends were allowed to see him in prison during the intervals of his trial.[3]

Thus, in the capital, the royal power, aided by the civil lawyers, was fast encroaching upon all the liberties of the subject, but in the provinces a more stubborn resistance was maintained. It was some little time after the period under consideration that the ancient Coutumier of Britanny was compiled, and in it we find the use of torture, though fully established as a judicial expedient, yet subjected to much greater restrictions. A prisoner, accused of a capital crime and denying the charge, was liable to torture only if positive evidence was unattainable, and then only if he had been under accusation within the previous five years. Moreover, if he endured its application three times without confession, he was discharged acquitted as one in whose favor God would work a miracle[4]—thus showing how torture was assimilated

[1] Ibid. I. 516.

[2] Ibid. I. 151, 163, 164, 173–77, 211, 269, 285, 306, 350, etc.

[3] See, for instance, the case of Pierre Fournet (Ibid. I. 516).

[4] Très Ancienne Cout. de Bretagne, cap. CI. (Bourdot de Richebourg

in the popular mind to the ordeal which it had supplanted. Such escape indeed might well be regarded as a miracle, for the reckless barbarity of the age had little scruple in pushing the administration of the question to the utmost rigor. About this same time, the Council of Reims, in 1408, drew up a series of instructions for the bishops of the province in visiting their dioceses; and among the abuses enumerated for investigation was whether the judges were in the habit of torturing prisoners to death on feast days.[1] It was not the cruelty, but the sacrilege to which the Church took exception.

Even in Germany, the citadel of feudalism, the progress of the new ideas and the influence of the Roman law had spread to such an extent that in the Golden Bull of Charles IV., in 1356, there is a provision allowing the torture of slaves to incriminate their masters in cases of sedition against any prince of the empire;[2] and the form of expression employed shows that this was an innovation. Liége, which at that period formed part of the empire, furnishes us with a case in 1376 which shows not only that torture then was an habitual resource in procedure, but also that it was applied as illogically there as we have seen it in Paris. The young wife of a burgher named Gilles Surlet was found one morning strangled in bed. The husband, as though conscious of innocence, at once presented himself to the authorities asserting with fearful oaths his ignorance of the crime. A servant girl of the household was then arrested, and she, without torture, immediately confessed that she had committed the murder; but the judges, not satisfied with this, submitted her to the question, when she denied her guilt with the most

IV. 224–5)—"Et s'il se peut passer sans faire confession en la gehenne, ou les jons, il se sauveroit, et il apparestroit bien que Dieu montreroit miracles pour luy."

[1] Concil. Remens. ann. 1408, cap. 49 (Martene Ampliss. Collect. VII. 420).

[2] Bull. Aur. cap. xxiv. § 9 (Goldast. I. 365).

provoking constancy. Suspicion then grew against the husband, and he was duly tortured without extorting a confession, though at the same time he declared that the girl was innocent; and on being taken back to his cell he strangled himself during the night. The chronicler does not record what was the fate of the girl, but the body of Gilles was treated as that of a murderer—it was dragged to the place of execution and broken on the wheel, while the superstitious did not fail to note that on this dreary transit it was accompanied by a black hog, which refused to be driven away until the gallows was reached.[1]

In Corsica, at the same period, we find the use of torture fully established, though subject to careful restrictions. In ordinary cases, it could only be employed by authority of the governor, to whom the judge desiring to use it transmitted all the facts of the case; the governor then issued an order, at his pleasure, prescribing the mode and degree to which it might be applied.[2] In cases of treason, however, these limitations were not observed, and the accused was liable to its infliction as far and as often as might be found requisite to effect a purpose.[3]

The Italian communities seem to have still at this period preserved some limitations on the application of torture. In Milan, in 1338, it could be only employed in capital cases where there was evidence or public repute; it could only be ordered by the lord of the city, his vicar, the podestà, and the criminal judges, and even these were heavily fined if they used it illegally or elsewhere than in the accustomed torture-chamber; the abuse of torturing witnesses had already been introduced, but the judge was warned that this could be done only when the witness swore to having been personally present and then varied in his testimony or gave false evidence. Torture, moreover, could only be inflicted once unless new

[1] Chron. Cornel. Zantfleit, ann. 1376 (Martene Ampl. Coll. V. 308–9).

[2] Statut. Criminali cap. xiv. (Gregorj, Statuti di Corsica, p. 101).

[3] Ibid. cap lx. (p. 163).

evidence supervened.[1] In the statutes of Mirandola, revised in 1386, it could not be employed in cases which did not involve corporal punishment or a fine of at least twenty-five lire; nor even then unless the podestà submitted all the evidence to the accused and gave him a sufficient and definite term in which to purge himself.[2] In Piacenza, about the same period, torture was guarded with even more careful restrictions. There is no indication that witnesses were exposed to it. Every effort to obtain testimony was to be exhausted, and the accused was to be afforded full opportunities for defence before he could be subjected to it, and then there must be sufficient indications of guilt, mere rumor being inadequate to justify it. Moreover, except in cases of high treason, theft, highway robbery, assassination, and arson, a single judge could not order it, but the case had to be submitted to all the judges and the podestà, who determined by a majority in secret ballot whether it should be employed. If any of these formalities were omitted, the confession extorted was invalid, and the judge was mulcted in a fine of a hundred lire.[3]

The peculiar character of Venetian civilization made torture almost a necessity. The atmosphere of suspicion and secrecy which surrounded every movement of that republican despotism, the mystery in which it delighted to shroud itself, and the pitiless nature of its legislation conspired to render torture an indispensable resource. How freely it was administered, especially in political affairs, is well illustrated in the statutes of the State Inquisition, where the merest suspicion is sufficient to authorize its application. Thus, if a senatorial secretary were observed to be more lavish in his expenditures than his salary would appear to justify, he was at once suspected of being in the pay of some foreign minister, and

[1] Statuta Criminalia Mediolani e tenebris in lucem edita, cap. 3, 24–28 (Bergomi, 1694).

[2] Statuti della Terra del Comune della Mirandola, Modena, 1885, p. 91.

[3] Statuta et Decreta antiqua Civitatis Placentiæ, Lib. v. Rubr. 96 (Placentiæ, 1560, fol. 63*b*).

spies were ordered on his track. If he were then simply found to be absent from his house at undue hours, he was immediately to be seized and put to the torture. So, if any one of the innumerable secret spies employed by the inquisitors were insulted by being called a spy, the offender was arrested and tortured to ascertain how he had guessed the character of the emissary.[1] Human life and human suffering were of little account in the eyes of the cold and subtle spirits who moulded the policy of the mistress of the Adriatic.

The rude mountaineers of the Valtelline preserved to a later date their respect for the ancient guarantees of the law. In their statutes as revised in 1548 torture is indeed permitted, but only in case of persons accused of crimes involving the penalty of blood. In accusations of less heinous offences and in matters concerning money, it was strictly forbidden; and even in cases where it was allowed it could not be employed without the assent of the central authority of the territory. When proceedings were had by inquisition, moreover, all the evidence was submitted to the accused, and a sufficient delay was accorded to him in which to frame a defence before he could be ordered to the torture. Thus were avoided the worst abuses to which the system had been made subservient long before that time in all the surrounding regions.[2]

Other races adopted the new system with almost equal hesitation. Thus in Hungary the first formal embodiment of torture in the law occurs in 1514, and though the terms employed show that it had been previously used to some extent, yet the restrictions laid down manifest an extreme jealousy of its abuse. Mere suspicion was not sufficient. To justify its application, a degree of proof was requisite which was almost competent for condemnation, and the nature of this evidence is well exemplified in the direction that if a judge himself

[1] Statuts de l'Inquisition d'Etat, 1e Supp. §§ 20, 21 (Daru).

[2] Li Statuti de Valtellina Riformati nella Città di Coira nell' anno del S. MDXLVIII. Stat. Crimin. cap. 8, 9, 10 (Poschiavo, 1549).

witnessed a murder, he could not order the homicide to be tortured unless there was other testimony sufficient, for he could not be both witness and judge, and his knowledge of the crime belonged to his private and not to his judicial capacity.[1] With such refinements, there would seem to be little danger of the extension of the custom.

In Poland, torture does not make its appearance until the fifteenth century, and then it was introduced gradually, with strict instructions to the tribunals to use the most careful discretion in its administration.[2] Until, at least, the seventeenth century, there remained in force laws of Casimir the Great promulgated in the fourteenth, prohibiting any prosecution not brought by a proper accuser, in whose presence alone could the matter be heard, thus showing that the inquisitorial process found no foothold in the Polish courts.[3] In Russia, the first formal allusion to it is to be found in the Ulagenié Zakonof, a code promulgated in 1497, by Ivan III., which merely orders that persons accused of robbery, if of evil repute, may be tortured to supply deficiencies of evidence; but as the duel was still freely allowed to the accused, the use of torture must have been merely incidental.[4] From another source, dating about 1530, we learn that it was customary to extort confessions from witches by pouring upon them from a height a small stream of cold water; and in cases of contumacious and stubborn criminals, the finger-nails were wrenched off with little wooden wedges.[5] Still, torture makes

[1] Synod. Reg. ann. 1514, Procem. (Batthyani Legg. Eccles. Hung. I. 574). According to some authorities, this was a general rule—"Judex quamvis viderit committi delictum non tamen potest sine aliis probationibus reum torquere, ut per Specul. etc."—Jo. Emerici a Rosbach Process. Criminal. Tit. v. cap. v. No. 13 (Francof. 1645).

[2] Du Boys, Droit Criminel, I. 650.

[3] Jo. Herb. de Fulstin. Statut. Reg. Polon. (Samoscii, 1597, p. 7).

[4] Esneaux, Hist. de Russie, III. 236.

[5] Pauli Jovii Moschovia.—This is a brief account of Russia, compiled about the year 1530, by Paulus Jovius, from his conversations with Dmitri,

but little show in the subsequent codes, such as the Sudebtnick, issued in 1550, and the Sobornoié Ulagenié, promulgated in 1648.[1] In fact, these regions were still too barbarous for so civilized a process.

In addition to these national jurisdictions there was a wide field open to the use of torture in the spiritual courts established everywhere, for it was not confined to the secular tribunals and to the Inquisition. The latter had so fully familiarized

ambassador to Clement VII. from Vasili V., first Emperor of Russia. Olaus Magnus, in the pride of his Northern blood, looks upon the statement in the text as a slander on the rugged Russ—"hoc scilicet pro terribili tormento in ea durissima gente reputari, quæ flammis et eculeis adhibitis, vix, ut acta revelet, tantillulum commovetur"—and he broadly hints that the wily ambassador amused himself by hoaxing the soft Italian: "Sed revera vel ludibriose bonus præsul a versuto Muscovitici principis nuntio Demetrio dicto, tempore Clementis VII. informatus est Romæ" (Gent. Septent. Hist. Brev. Lib. XI. c. xxvi.). The worthy archbishop doubtless spoke of his own knowledge with respect to the use of the rack and fire in Russia, but the contempt he displays for the torture of a stream of water is ill-founded. In our prisons the punishment of the shower-bath is found to bring the most refractory characters to obedience in an incredibly short time, and its unjustifiable severity in a civilized age like this may be estimated from the fact that it has occasionally resulted in the death of the patient. Thus, at the New York State Prison at Auburn, in December, 1858, a strong, healthy man, named Samuel Moore, was kept in the shower-bath from a half to three-quarters of an hour, and died almost immediately after being taken out. A less inhumane mode of administering the punishment is to wrap the patient in a blanket, lay him on his back, and, from a height of about six feet, pour upon his forehead a stream from an ordinary watering-pot without the rose. According to experts, this will make the stoutest criminal beg for his life in a few seconds.

During the later period of our recent war, when the prevalence of exaggerated bounties for recruits led to an organized system of desertion, the magnitude of the evil seemed to justify the adoption of almost any means to arrest a practice which threatened rapidly to exhaust the resources of the country. Accordingly, the shower-bath was occasionally put into requisition by the military authorities to extort confession from suspected deserters, when legal evidence was not attainable, and it was found exceedingly efficacious.

[1] Du Boys, *op. cit.* I. 618.

the minds of churchmen with it that it came to be employed generally in the episcopal tribunals which, through their exclusive jurisdiction over clerks and over all matters that could be connected with spiritual offences, had considerable criminal business. We may assume, however, that in this respect they were limited by the laws of the land and were debarred from its use in countries where it was not allowed in secular matters. In 1310 it required the most urgent pressure from Clement V. to induce Edward II. to violate the common law by permitting the papal emissaries to torture the English Templars, and the King sought to conceal the illegality of the act by an order to the gaolers which bore that the inquisitors and episcopal ordinaries should be allowed to deal with the bodies of the prisoners "in accordance with ecclesiastical law,"[1] showing how completely in the minds of men torture was identified with the spiritual courts. When the canons of the council of Vienne were promulgated in 1317 and the inquisitor Bernard Gui remonstrated with John XXII. against a clause intended to diminish the abuse of torture by inquisitors, he argued that it was a reflection on the Inquisition, because the episcopal courts were subject to no such restrictions on its use.[2] The Church carried this blessing with it wherever it went. When in 1593 St. Toribio, Archbishop of Lima, sought to reform the abuses of the episcopal courts throughout his vast province, he issued an *arancel* or tariff of fees for all their officials. In this we find that the executioner was not to charge more than a peso for torturing a prisoner, while the notary was entitled to two reales for drawing up a sentence of torture, and one real for each folio of his record of its administration and the confession of the accused.[3]

[1] Quod iidem prælati et inquisitores de ipsis Templariis et eorum corporibus, quotiens voluerint, ordinent et faciant id quod eis, secundum legem ecclesiasticam, videbitur faciendum.—Rymer, Fœdera, III. 203.

[2] C. 1 § 1 Clement. v. 3.—Bern. Guidonis Gravamina (MSS. Doat, XXX.).

[3] Haroldus, Lima limata Conciliis etc. Romæ, 1672, pp. 75, 76.

CHAPTER VII.

THE INQUISITORIAL PROCESS.

DURING this period, while Central and Western Europe had advanced with such rapid strides of enlightenment, the inquisitorial process, based upon torture, had become the groundwork of all criminal procedure, and every detail was gradually elaborated with the most painstaking perverseness.

Allusion has already been made to the influence of the Inquisition in introducing the use of torture. Its influence did not cease there, for with torture there gradually arose the denial to the accused of all fair opportunity of defending himself, accompanied by the system of secret procedure which formed so important a portion of the inquisitorial practice. In the old feudal courts, the prosecutor and the defendant appeared in person. Each produced his witnesses; the case was argued on both sides, and unless the wager of battle or the ordeal intervened, a verdict was given in accordance with the law after duly weighing the evidence, while both parties were at liberty to employ counsel and to appeal to the suzerain. When St. Louis endeavored to abolish the duel and to substitute a system of inquests, which were necessarily to some extent *ex parte*, he did not desire to withdraw from the accused the legitimate means of defence, and in the Ordonnance of 1254 he expressly instructs his officers not to imprison the defendant without absolute necessity, while all the proceedings of the inquest are to be communicated freely to him.[1] All this changed with time and the authoritative adoption of torture. The theory of the Inquisition, that the suspected man was to

[1] Statut. S. Ludov. ann. 1254, §§ 20, 21 (Isambert, I. 270).

be hunted down and entrapped like a wild beast, that his guilt was to be assumed, and that the efforts of his judges were to be directed solely to obtaining against him sufficient evidence to warrant the extortion of a confession without allowing him the means of defence—this theory became the admitted basis of criminal jurisprudence. The secrecy of these inquisitorial proceedings, moreover, deprived the accused of one of the greatest safeguards accorded to him under the Roman law of torture. That law, as we have seen, required the formality of inscription, by which the accuser who failed to prove his charge was liable to the *lex talionis*, and in crimes which involved torture in the investigation he was duly tortured. This was imitated by the Wisigoths, and its principle was admitted and enforced by the Church before the introduction of the Inquisition had changed its policy;[1] but modern Europe, in borrowing from Rome the use of torture, combined it with the inquisitorial process, and thus in civilized Christendom it speedily came to be used more recklessly and cruelly than ever it had been in pagan antiquity.

In 1498, an assembly of notables at Blois drew up an elaborate ordonnance for the reformation of justice in France. In this, the secrecy of the inquisitorial process is dwelt upon with peculiar insistence as of the first importance in all criminal cases. The whole investigation was in the hands of the government official, who examined every witness by himself, and secretly, the prisoner having no knowledge of what was done, and no opportunity of arranging a defence. After all the testimony procurable in this one-sided manner had been obtained, it was discussed by the judges, in council with other persons named for the purpose, who decided whether the accused should be tortured. He could be tortured but once, unless fresh evidence subsequently was collected against him,

[1] Thus Gratian, in the middle of the twelfth century—"Qui calumniam illatam non probat pœnam debet incurrere quam si probasset reus utique sustineret."—Decreti P. II. caus. v. quæst. 6, c. 2.

and his confession was read over to him the next day, in order that he might affirm or deny it. A secret deliberation was then held by the same council, which decided as to his fate.[1]

This cruel system was still further perfected by Francis I., who, in an ordonnance of 1539, expressly abolished the inconvenient privilege assured to the accused by St. Louis, which was apparently still occasionally claimed, and directed that in no case should he be informed of the accusation against him, or of the facts on which it was based, nor be heard in his defence. Upon examination of the *ex parte* testimony, without listening to the prisoner, the judges ordered torture proportioned to the gravity of the accusation, and it was applied at once, unless the prisoner appealed, in which case his appeal was forthwith to be decided by the superior court of the locality.[2] The whole process was apparently based upon the conviction that it was better that a hundred innocent persons should suffer than that one culprit should escape, and

[1] Ordonnance, Mars 1498, §§ 110–116 (Isambert, XI. 365.—Fontanon, I. 710). It would seem that the only torture contemplated by this ordonnance was that of water, as the clerk is directed to record "la quantité de l'eau qu'on aura baillée audit prisonnier." This was administered by gagging the patient, and pouring water down his throat until he was enormously distended. It was sometimes diversified by making him eject the water violently, by forcible blows on the stomach (Fortescue de Laudibus Legg. Angliæ, cap. xxii.). Sometimes a piece of cloth was used to conduct the water down his throat. To this, allusion is made in the "Appel de Villon":—

"Se fusse des hoirs Hue Capel
Qui fut extraict de boucherie,
On ne m'eust, parmy ce drapel,
Faict boyre à celle escorcherie."

[2] Ordonn. de Villers Cotterets, Août 1539, §§ 162–164 (Isambert, XIII. 633–4). "Ostant et abolissant tous styles, usances ou coutumes par lesquels les accusés avoient accoutumés d'être ouïs en jugement pour sçavoir s'ils devoient être accusés, et à cette fin avoir communication des faits et articles concernant les crimes et délits dont ils étoient accusés."

it would not be easy to devise a course of procedure better fitted to render the use of torture universal. There was some protection indeed, theoretically at least, in the provision which held the judge responsible when an innocent prisoner was tortured without sufficient preliminary proof to justify it; but this salutary regulation, from the very nature of things, could not often be enforced, and it was so contrary to the general spirit of the age that it soon became obsolete. Thus, in Brittany, perhaps the most independent of the French provinces, the Coutumier, as revised in 1539, retains such a provision,[1] but it disappears in the revision of 1580.

But even this was not all. Torture, as thus employed to convict the accused, became known as the *question préparatoire;* and, in defiance of the old rule that it could be applied but once, a second application, known as the *question définitive* or *préalable*, became customary, by which, after condemnation, the prisoner was again subjected to the extremity of torment in order to discover whether he had any accomplices, and, if so, to identify them. In this detestable practice we find another instance of the unfortunate influence of the Inquisition in modifying the Roman law. The latter expressly and wisely provided that no one who had confessed should be examined as to the guilt of another;[2] and in the ninth century the authors of the False Decretals had emphatically adopted the principle, which thus became embodied in ecclesiastical law,[3] until the ardor of the Inquisition in hunting down here-

[1] Anc. Cout. de Bretagne, Tit. I. art. xli.—D'Argentré's labored commentary on this article is a lamentable exhibition of the utter confusion which existed as to the nature of preliminary proof justifying torture. Comment. pp. 139, sqq.

[2] Nemo igitur de proprio crimine confitentem super conscientia scrutetur aliena.—Const. 17 Cod. IX. ii. (Honor. 423).

[3] Nemini de se confesso credi potest super crimen alienum, quoniam ejus atque omnis rei professio periculosa est, et admitti adversus quemlibet non debet.—Pseudo-Julii Epist. II. cap. xviii.—Gratian. Decret. P. II. caus. v. quæst. 3, can. 5.

tics caused it to regard the conviction of the accused as a barren triumph unless he could be forced to incriminate his possible associates. It thus finally became a rule of the Inquisition, promulgated by papal authority, that all who confessed or were convicted should be tortured at the discretion of the inquisitor to reveal the names of their accomplices.[1]

Torture was also generically divided into the *question ordinaire* and *extraordinaire*—a rough classification to proportion the severity of the infliction to the gravity of the crime or the urgency of the case. Thus, in the most usual kind of torment, the strappado, popularly known as the *Moine de Caen*, the ordinary form was to tie the prisoner's hands behind his back with a piece of iron between them; a cord was then fastened to his wrists by which, with the aid of a pulley, he was hoisted from the ground with a weight of one hundred and twenty-five pounds attached to his feet. In the extraordinary torture, the weight was increased to two hundred and fifty pounds, and when the victim was raised to a sufficient height he was dropped and arrested with a jerk that dislocated his joints, the operation being thrice repeated.[2]

Thus, in 1549, we see the system in full operation in the case of Jacques de Coucy, who, in 1544, had surrendered Boulogne to the English. This was deemed an act of treachery, but he was pardoned in 1547; yet, notwithstanding his pardon, he was subsequently tried, convicted, condemned to decapitation and quartering, and also to the *question extraordinaire* to obtain a denunciation of his accomplices.[3]

[1] Inhærendo decretis alias per felicis recordationis Paulum papam quartum Sanctissimus dominus noster Pius papa quintus decrevit omnes et quoscunque reos convictos et confessos de heresi pro ulteriori veritate habenda et super complicibus fore torquendos arbitrio dominorum judicum.—Locati Opus Judiciale Inquisitorum, Romæ, 1570, p. 477.

[2] Chéruel, Dict. Hist. des Institutions, etc. de la France, p. 1220 (Paris, 1855).

[3] Isambert, XIV. 88. Beccaria comments on the absurdity of such proceedings, as though a man who had accused himself would make any difficulty in accusing others.—"Quasi che l'uomo che accusa sè stesso, non

When Louis XIV., under the inspiration of Colbert, remoulded the jurisprudence of France, various reforms were introduced into the criminal law, and changes both for better and worse were made in the administration of torture. The Ordonnance of 1670 was drawn up by a committee of the ablest and most enlightened jurists of the day, and it is a melancholy exhibition of human wisdom when regarded as the production of such men as Lamoignon, Talon, and Pussort. The cruel mockery of the *question préalable* was retained; and in the principal proceedings all the chances were thrown against the prisoner. All preliminary testimony was still *ex parte*. The accused was heard, but he was still examined in secret. Lamoignon vainly endeavored to obtain for him the advantage of counsel, but Colbert obstinately refused this concession, and the utmost privilege allowed the defence was the permission accorded to the judge, at his discretion, to confront the accused with the adverse witnesses. In the *question préliminaire*, torture was reserved for capital cases, when the proof was strong and yet not enough for conviction. During its application it could be stopped and resumed at the pleasure of the judge, but if the accused were once unbound and removed from the rack, it could not be

accusi più facilmente gli altri. E egli giusto il tormentare gli uomini per l'altrui delitto?"—Dei Delitte e delle Pene, § XII. A curious illustration of its useless cruelty when applied to prisoners of another stamp is afforded by the record of a trial which occurred at Rouen in 1647. A certain Jehan Lemarinier, condemned to death for murder, was subjected to the *question définitive*. Cords twisted around the fingers, scourging with rods, the strappado with fifty pounds attached to each foot, the thumb-screw were applied in succession and together, without eliciting anything but fervent protestations of innocence. The officials at last wearied out remanded the convict to prison, when he sent for them and quietly detailed all the particulars of his crime, committed by himself alone, requesting especially that they should record his confession as having been spontaneous, for the relief of his conscience, and not extorted by torment.—Desmaze, Les Pénalités Anciennes, p. 159, Paris, 1866.

repeated, even though additional evidence were subsequently obtained.[1]

It was well to prescribe limitations, slender as these were; but in practice it was found impossible to enforce them, and they afforded little real protection to the accused when judges, bent upon procuring conviction, chose to evade them. A contemporary whose judicial position gave him every opportunity of knowing the truth, remarks: "They have discovered a jugglery of words and pretend that though it may not be permissible to *repeat* the torture, still they have a right to *continue* it, though there may have been an interval of three whole days. Then, if the sufferer, through good luck or by a miracle, survives this reduplication of agony, they have discovered the notable resource of *nouveaux indices survenus*, to subject him to it again without end. In this way they elude the intention of the law, which sets some bounds to these cruelties and requires the discharge of the accused who has endured the question without confession, or without confirming his confession after torture."[2] Nor were these the only modes by which the scanty privileges allowed the prisoner were curtailed in practice. In 1681, a royal Declaration sets forth that, in the jurisdiction of Grenoble, judges were in the habit of refusing to listen to the accused, and of condemning him unheard, an abuse which was prohibited for the future. Yet other courts subsequently assumed that this prohibition was only applicable to the Parlement of Grenoble, and in 1703 another Declaration was necessary to enforce the rule throughout the kingdom.[3]

The Ordonnance of 1670, moreover, gave formal expression to another abuse which was equally brutal and illogical—the employment of torture *avec réserve des preuves*. When the judge resolved on this, the silence of the accused under

[1] Ordonnance Criminel d'Août 1670, Tit. xiv. xix. (Isambert, XIX. 398, 412).

[2] Nicolas, Dissertation Morale et Juridique sur la Torture, p. 111 (Amsterd. 1682).

[3] Déclaration du 13 Avril 1703 (Ordonnances d'Alsace, I. 340).

torment did not acquit him, though the whole theory of the question lay in the necessity of confession. He simply escaped the death penalty, and could be condemned to any other punishment which the discretion of the judge might impose, thus presenting the anomaly of a man neither guilty nor innocent, relieved from the punishment assigned by the law to the crime for which he had been arraigned, and condemned to some other penalty without having been convicted of any offence. This punishing for suspicion was no new thing. Before torture came fully into vogue, in the early part of the fourteenth century, a certain Estevenes li Barbiers of Abbeville was banished under pain of death for suspicion of breach of the peace, and was subsequently tried, acquitted, and allowed to return.[1] About the same period a barber of Anet and his sons were arrested by the monks of St. Martin-des-Champs on suspicion of killing a guard who was keeping watch over some hay. The evidence against them was insufficient, and they were taken to the gallows as a kind of moral torture not infrequently used in those days. Still refusing to confess, they were banished forever under pain of hanging, because, as the record ingenuously states, the crime was not fully proved against them.[2] So in the records of the Parlement of Paris there is a sentence rendered in 1402 against Jehan Dubos, a procureur of the Parlement, and Ysabelet his wife, for suspicion of the poisoning of another procureur, Jehan le Charron, the first husband of Ysabelet, and Dubos was accordingly hanged, while his wife was burnt.[3] Jean Bodin, one of the clearest intellects of the sixteenth century, lays it down as a rule that the penalty should be proportioned to the proof; he ridicules as obsolete the principle that when the evidence is not sufficient for conviction the accused should be discharged, and mentions stripes, fines, imprisonment, the

[1] Coutumier de Picardie, Éd. Marnier, p. 88.

[2] Registre Criminel de la Justice de S. Martin-des-Champs. Paris, 1877, p. 229.

[3] Desmaze, Pénalités Anciennes, p. 204.

galleys, and degradation as proper substitutes for death when there is no evidence and only violent presumption. He gives in illustration of this a case personally known to him of a noble of Le Mans, who was condemned to nine years of the galleys for violent suspicion of murder.[1] The application to the torture-process of this determination not to allow a man to escape unless his innocence was proved led to the illogical system of the *réserve des preuves*.

The theory on which the doctors of the law proceeded was that if there were evidence sufficient for conviction and the judge yet tortured the criminal in surplusage without obtaining a confession, the accused could not be condemned to the full punishment of his offence, because the use of torture in itself weakened the external proofs, and therefore the culprit must be sentenced to some lighter punishment—a refinement worthy of the inconsequential dialectics of the schools.[2] The cruel absurdities which the system produced in practice are well illustrated by a case occurring in Naples in the sixteenth century. Marc Antonio Maresca of Sorrento was tried by the Admiralty Court for the murder of a peasant of Miani, in the market-place. The evidence was strong against him, but there were no eye-witnesses, and he endured the torture without confession. The court asserted that it had reserved the evidence, and condemned him to the galleys for seven years. He appealed to the High Court of the royal council, and the case was referred to a distinguished jurisconsult, Tomaso Grammatico, a member of the council. The latter reported that he must be considered as innocent, after having passed through torture without confession, and denied the right of the court to reserve the evidence. Then, with an exhibition of the peculiar logic characteristic of the criminal jurisprudence of the time, he concluded that Maresca might be relegated to the islands for five years, although it was a recognized principle of Nea-

[1] Bodini de Magor. Dæmonoman. Basil. 1581, pp. 325, 334, 390.

[2] Scialojæ Praxis torquendi Reos c. i. No. 12 (Neap. 1653).

politan law that torture could be inflicted only in accusations of crimes of which the penalty was greater than relegation. The only thing necessary to complete this tissue of legal wisdom was afforded by the council, which set aside the judgment of the Admiralty Court, rejected the report of their colleague, and condemned the prisoner to the galleys for three years.[1] Somewhat less complicated in its folly, but more inexcusable from its date, was the sentence of the court of Orléans in 1740, by which a man named Barberousse, from whom no confession had been extorted, was condemned to the galleys for life, because, as the sentence declared, he was *strongly suspected* of premeditated murder.[2] A more pardonable, but not more reasonable, example occurred at Halle in 1729, where a woman accused of infanticide refused to confess, and as she labored under a physical defect which rendered the application of torture dangerous to life, the authorities, after due consideration and consultation of physicians, spared her the torture and banished her without conviction.[3]

The same tendency to elude all restrictions on the use of torture was manifested in the Netherlands, where the procedure was scarcely known until the 16th century, and where it was only administered systematically by the ordonnance on criminal justice of Philip II. in 1570. When once employed it rapidly extended until it became almost universal, both in the provinces which threw off the yoke of Spain and in those which remained faithful. The limits which Philip had imposed on it were soon transcended. He had forbidden its employment in all cases "où il n'y a plaine, demye preuve, ou bien où la preuve est certaine et indubitable," thus restricting it to those where there was very strong presumption without absolute certainty. In transcription and translation, however, the wording of the

[1] Thomæ Grammatici Decisiones Neapolitanæ, pp. 1275–6 (Venetiis 1582). Cf. Scialojæ *op. cit.* c. i. No. 22.

[2] L'Oiseleur, Les Crimes et les Peines, pp. 206–7.

[3] Braune Dissert. de Tortura Valetudinar. Halæ Cattor. 1740, p. 28.

ordonnance became changed to "plaine ou demye preuve, ou bien où la preuve est incertaine ou douteuse," thus allowing it in all cases where the judge might have a doubt not of the guilt but of the innocence of the accused; and by the time these errors were discovered by a zealous legal antiquarian, the customs of the tribunals had become so fixed that the attempt to reform them was vain.[1] Even the introduction of torture could not wholly eradicate the notion on which the ordeal system was based, that a man under accusation must virtually prove his innocence.

In Germany, torture had been reduced to a system, in 1532, by the Emperor Charles V., whose *Caroline Constitutions* contain a more complete code on the subject than had previously existed, except in the records of the Inquisition. Inconsistent and illogical, it quotes Ulpian to prove the deceptive nature of the evidence thence derivable; it pronounces torture to be "res dira, corporibus hominum admodum noxia et quandoque lethalis, cui et mors ipsa prope proponenda;"[2] in some of its provisions it manifests extreme care and tenderness to guard against abuses, and yet practically it is merciless to the last degree. Confession made during torture was not to be believed, nor could a conviction be based upon it; yet what the accused might confess after being removed from torture was to be received as the deposition of a dying man, and was full evidence.[3] In practice, however, this held good only when adverse to the accused, for he was brought before his judge after an interval of a day or two, when, if he confirmed the confession, he was condemned, while if he retracted it he was at once thrust again upon the rack. In confession under torture, moreover, he was to be closely cross-questioned, and if any inconsistency was observable in his self-condemnation the torture was at once to be redoubled in severity.[4] The

[1] Meyer, Institutions Judiciaires, IV. 285, 293.

[2] Legg. Capital. Caroli V. c. lx. lviii.

[3] Ibid. c. xx. lviii.

[4] Ibid. c. lv. lvi. lvii.

legislator thus makes the victim expiate the sins of his own vicious system; the victim's sufferings increase with the deficiency of the evidence against him, and the legislator consoles himself with the remark that the victim has only himself to thank for it, "de se tantum non de alio quæratur." To complete the inconsistency of the code, it provided that confession was not requisite for conviction; irrefragable external evidence was sufficient; and yet even when such evidence was had, the judge was empowered to torture in mere surplusage.[1] Yet there was a great show of tender consideration for the accused. When the weight of conflicting evidence inclined to the side of the prisoner, torture was not to be applied.[2] Two adverse witnesses, or one unexceptionable one, were a condition precedent, and the legislator shows that he was in advance of his age by ruling out all evidence resting on the assertions of magicians and sorcerers.[3] To guard against abuse, the impossible effort was made to define strictly the exact quality and amount of evidence requisite to justify torture, and the most elaborate and minute directions were given with respect to all the various classes of crime, such as homicide, child-murder, robbery, theft, receiving stolen goods, poisoning, arson, treason, sorcery, and the like;[4] while the judge administering torture to an innocent man on insufficient grounds was liable to make good all damage or suffering thereby inflicted.[5] The amount of torment, moreover, was to be proportioned to the age, sex, and strength of the patient; women during pregnancy were never to be subjected to it; and in no case was it to be carried to such a point as to cause permanent injury or death.[6]

[1] Legg. Capital. Carol. V. c. xxii. lxix.

[2] Ibid. c. xxviii.

[3] Ibid. c. xxiii. xxi.

[4] Ibid. c. xxxiii.–xliv.

[5] Ibid. c. xx. lxi.

[6] Ibid. c. lviii. lix. Accusatus, si periculum sit, ne inter vel post tormenta ob vulnera expiret, ea arte torquendus est, ne quid damni accipiat.

CHAPTER VIII.

FINAL SHAPE OF THE TORTURE SYSTEM.

CHARLES V. was too astute a ruler not to recognize the aid derivable from the doctrines of the Roman law in his scheme of restoring the preponderance of the Kaisership, and he lost no opportunity of engrafting them on the jurisprudence of Germany. In his Criminal Constitutions, however, he took care to embody largely the legislation of his predecessors and contemporaries, and though protests were uttered by many of the Teutonic princes, the code, adopted by the Diet of Ratisbon in 1532, became part and parcel of the common law of Germany.[1] A fair idea of the shape assumed, under these influences, by the criminal law in its relations with torture, can be obtained by examining some of the legal text-books which were current as manuals of practice from the sixteenth to the eighteenth century.[2] As most of the authors of these

[1] Heineccii Hist. Jur. Civ. Lib. II. §§ cv. sqq.—Meyer (Instit. Judiciaires, Liv. VI. chap. xi.) gives a very interesting sketch of the causes which led to the overthrow of the old system of jurisprudence throughout Germany. He attributes it to the influence of the emperors and the municipalities, each equally jealous of the authority of the feudal nobles, aided by the lawyers, now becoming a recognized profession. These latter of course favored a jurisprudence which required long and special training, thus conferring upon them as a class peculiar weight and influence.

[2] My principal authorities are :—

Rerum Criminalium Praxis, by Josse Damhouder, a lawyer and statesman of repute in Flanders, where he held a distinguished position under Charles V. and Philip II. His work was received as an authority throughout Europe for two centuries, having passed through numerous editions, from that of Louvain, in 1554, to that of Antwerp, in 1750. My edition is of Antwerp, 1601.

Tractatus de Quæstionibus seu Torturis Reorum, published in 1592 by

works appear to condemn the principle or to lament the necessity of torture, their instructions as to its employment may safely be assumed to represent the most humane and enlightened views current during the period.[1] It is easy to see from them, however, that though the provisions of the Caroline Constitutions were still mostly in force, yet the practice had greatly extended itself, and that the limitations prescribed for the protection of innocence and helplessness had become of little real effect.

Upon the theory of the Roman law, nobles and the learned professions had claimed immunity from torture, and the Roman law inspired too sincere a respect to permit a denial of the claim,[2] yet the ingenuity of lawyers reduced the privilege

Johann Zanger, of Wittenberg, a celebrated jurisconsult of the time, and frequently reprinted. My edition is that of 1730, with notes by the learned Baron Senckenberg, and there is a still later one, published at Frankfort in 1763.

Practica Criminalis, seu Processus Judiciarius ad usum et consuetudinem judiciorum in Germania hoc tempore frequentiorem, by Johann Emerich von Rosbach, published in 1645 at Frankfort on the Mayn.

Tractatio Juridica, de Usu et Abusu Torturæ, by Heinrich von Boden, a dissertation read at Halle in 1697, and reprinted by Senckenberg in 1730, in conjunction with the treatise of Zanger.

Scialojæ Praxis torquendi Reos, Neapoli, 1653.

Tractatus de Maleficiis, nempe D. Alberti de Gandino, D. Bonifacii de Vitalianis, D. Pauli Grillandi, D. Baldi de Periglis, D. Jacobi de Arena. Venetiis, 1560

[1] Cum nihil tam severum, tam crudele et inhumanum videatur quam hominem conditum ad imaginem Dei . . . tormentis lacerare et quasi excarnificare, etc.—Zangeri Tract. de Quæstion. cap. I. No. 1.

Tormentis humanitatis et religionis, necnon jurisconsultorum argumenta repugnant.—Jo. Emerici a Rosbach. Process. Crimin. Tit. v. c. ix. No. 1.

Saltem horrendus torturæ abusus ostendit, quo miseri, de facinore aliquo suspecti, fere infernalibus, et si fieri possit, plusquam diabolicis cruciatibus exponuntur, ut qui nullo legitimo probandi modo convinci poterant, atrocitate cruciatuum contra propriam salutem confiteri, seque ita destruere sive jure sive injuria, cogantur.—Henr. de Boden Tract. Præfat.

[2] Zangeri cap. I. Nos. 49–58.

to such narrow proportions that it was practically almost valueless. For certain crimes, of course, such as *majestas*, adultery, and incest, the authority of the Roman law admitted of no exceptions, and to these were speedily added a number of other offences, classed as *crimina excepta* or *nefanda*, which were made to embrace almost all offences of a capital nature, in which alone torture was as a rule allowable. Thus, parricide, uxoricide, fratricide, witchcraft, sorcery, counterfeiting, theft, sacrilege, rape, arson, repeated homicide, etc., came to be included in the exceptional cases, and the only privileges extended in them to nobles were that they should not be subjected to "plebeian" tortures.[1] As early as 1514, I find an instance which shows how little advantage these prerogatives afforded in practice. A certain Dr. Bobenzan, a citizen of good repute and syndic of Erfurt, who both by position and profession belonged to the excepted class, when brought up for sentence on a charge of conspiring to betray the city, and warned that he could retract his confession, extracted under torture, pathetically replied—"During my examination, I was at one time stretched upon the rack for six hours, and at another I was slowly burned for eight hours. If I retract, I shall be exposed to these torments again and again. I had rather die"—and he was duly hanged.[2] In fact, all these

[1] Zangeri cap. I. Nos. 59–88.—Knipschild, in his voluminous "Tract. de Nobilitate" (Campodun. 1693), while endeavoring to exalt to the utmost the privileges of the nobility, both of the sword and robe, is obliged to admit their liability to torture for these crimes, and only urges that the preliminary proof should be stronger than in the case of plebeians (Lib. II. cap. iv. Nos. 108–120); though, in other accusations, a judge subjecting a noble to torture should be put to death, and his attempt to commit such an outrage could be resisted by force of arms (Ibid. No. 103). He adds, however, that no special privileges existed in France, Lombardy, Venice, Italy, and Saxony (Ibid. Nos. 105–7). Scialoja expressly says (Praxis c. xiii. Nos. 40–49. 55) that in Naples no dignity, secular or ecclesiastical, except that of judges, conferred immunity from torture; and all privileges were set aside by a direct order from the sovereign.

[2] Erphurdianus Varíloquus, ann. 1514 (Mencken. Script. Rer. German. II. 527–8).

exemptions were rather theoretical than practical, and they were speedily set aside.[1]

In Catholic countries, of course, the clergy were specially favored, but the immunity claimed for them by the canon law was practically reduced to nearly the same as that accorded to nobles.[2] The torture inflicted on them, however, was lighter than in the case of laymen, and proof of a much more decided character was required to justify their being exposed to torment. As an illustration of this, von Rosbach remarks that if a layman is found in the house of a pretty woman, most authors consider the fact sufficient to justify torture on the charge of adultery, but that this is not the case with priests, who if they are caught embracing a woman are presumed to be merely blessing her.[3] They moreover had the privilege of being tortured only at the hands of clerical executioners, if such were to be had.[4] In Protestant territories respect for the cloth was manifested by degrading them prior to administering the rack or strappado.[5]

Some limitations were imposed as to age and strength. Children under fourteen could not be tortured, nor the aged whose vigor was unequal to the endurance, but the latter could be tied to the rack, and menaced to the last extremity; and the elasticity of the rule is manifested in a case which attracted attention at Halle in the eighteenth century, in which a man more than eighty years of age was decided to be fit to bear the infliction, and only escaped by opportunely dying.[6] In fact, Grillandus argues that age confers no immunity from torture, but that a humane judge will inflict it only moderately,

[1] Grillandi de Quæst. et Tortura Q. vi.—Baldi de Periglis de Quæstionibus c. iii. § 4.—Alberti de Gandino de Quæstionibus §§ 7, 9, 36, 37.

[2] Damhouder. Rer. Crimin. Praxis cap. xxxvii. Nos. 23, 24. Cf. Passerini Regulare Tribunal Quæst. xv. Art. ix. No. 117.

[3] Emer. a Rosbach Process. Crimin. Tit. v. cap. xiv.

[4] Simancæ de Cathol. Instit. Tit. LXV. No. 50.

[5] Willenbergii Tract. de Excess. et Pœnis Cleric. 4to. Jenæ, 1740, p. 41.

[6] Braune Diss. de Tortura Valetudinar. p. 32.

except in atrocious crimes; as for children, though regular torture could not be employed on them, the rod could be legitimately used.[1] Insanity was likewise a safeguard, and much discussion was had as to whether the deaf, dumb, and blind were liable or not. Zanger decides in the affirmative whenever, whether as principals or witnesses, good evidence was to be expected from them;[2] and Scialoja points out that though deaf-mutes as a rule are not to be tortured because they cannot dictate a confession, yet if they can read and write so as to understand the accusation and write out what they have to say, they are fit subjects for the torturer.[3] Pregnant women also were exempt until forty days after childbed, even though they had become so in prison for the express purpose of postponing the infliction.[4] Some kinds of disease likewise conferred exemption, and jurisconsults undertook with their customary minuteness to define with precision this nosology of torture, leading to discussions more prolonged than profitable. Gout, for instance, gave rise to doubt, and some authors were found to affirm that they knew of cases in which gouty patients had been cured by a brisk application of the implements of the *marter-kammer* or torture-chamber.[5] Other legists gravely disputed whether in the case of epileptics the judge should bear in mind the aspects of the moon and the equinoxes and solstices, at which times the paroxysms of the disease were apt to be more violent. Those who thus escaped torture on account of disease presented a problem which the jurists solved in their ordinary fashion by condemning them to some other punishment than that provided for the crime of which they had been accused but not convicted.[6]

In theory the accused could be tortured only once, but this,

[1] Grillandi de Quæstione et Tortura, Q. vi. §§ 4, 6, 9.—Baldi de Periglis de Quæstionibus cap. i. § 4.

[2] Zangeri *op. cit.* cap. I. Nos. 34–48.

[3] Scialojæ c. xiii. No. 21.

[4] Ibid. Nos. 24–30.

[5] Goetzii Dissert. de Tortura, Lipsiæ, 1742, pp. 46–8.

[6] Braune Diss. de Tortura Valetudinar. pp. 24, 43.

like all other restrictions in favor of humanity, amounted to but little. A repetition of torture could be justified on the ground that the first application had been light or insufficient; the production of fresh evidence authorized a second and even a third infliction; a failure to persevere in confession after torture rendered a repetition requisite; and even a variation in the confession required confirmation by the rack or strappado.[1] Many writers affirm that a second torture is requisite to purge away the defect of the infamy incurred by confession under the first, as well as to strengthen the evidence against accomplices.[2] In fact, some authorities go so far as to place it entirely at the discretion of the judge whether the accused shall be subjected or not to repeated torment without fresh evidence,[3] and Del Rio mentions a case occurring in Westphalia wherein a man accused of lycanthropy was tortured twenty times.[4] This practice of repeating torture we are told by many authorities was exceedingly common.[5]

Another positive rule was that torture could only be applied in accusations involving life or limb.[6] Thus, for instance, in provinces where usury was punishable only by confiscation, torture could not be used to prove it, but where it entailed also some corporal infliction, the accused could be subjected to the rack.[7] Yet when Bologna undertook to remove the abuses of her torture system she still allowed it in cases involving a pecuniary fine of a hundred lire, or over.[8] Whip-

[1] Zangeri cap. v. Nos. 73–83.

[2] Del Rio Magicarum Disquisit. Lib. v. Sect. iii. L.

[3] Damhouder. *op. cit.* cap. xxxviii. Nos. 3, 4.—Rosbach. Tit. v. cap. xv. No. 14.—Simancas, however, declares that only two applications of torture are allowable (De Cathol. Instit. Tit. LXV. Nos. 76, 81).

[4] Disquis. Magicar. Lib. v. sect. ix.

[5] Assessores tamen honoris et avidi et cupidi hoc non servant imo quotidie quæstiones repetunt absque novis indiciis.—Baldi de Periglis de Quæstionibus cap. i. § 6. So also Alberti de Gandino de Quæstionibus § 20, and Bonifacii de Vitalianis, Rubr. *Quæ Indicia* § 8.

[6] Zangeri Præfat. No. 31.

[7] Scialojæ *op. cit.* cap. i. No. 27.

[8] Statuta Criminalia Communis Bononiæ (Bononiæ, 1525, fol. 15 *a*).

ping being a corporal punishment, and yet a much lighter infliction than torture, the legists were divided as to whether a crime for which it was the only penalty was one involving the liability of the accused to torture, but the weight of authority, as usual, leaned to the side of the free employment of the rack.[1] All these fine-spun distinctions, however, were of little moment, for Senckenberg assures us that he had known torture to be resorted to in mercantile matters, where money only was at stake.[2] Slaves could always be tortured in civil suits when their testimony was required, and freemen when there was suspicion of fraud;[3] and it was a general rule of mercantile law that it could be employed in accusations of fraudulent bankruptcy.[4] How easily, indeed, all these barriers were overleaped is seen in the rule that where the penalty was a fine, and the accused was too poor to pay it, he could be tortured, the torture serving in lieu of punishment. Thus, whether he was innocent or guilty, the judge was determined that he should not escape.[5] Another method in constant use of evading the limitation in offences which by statute did not involve torture was by depriving him of food in prison, or stripping him of clothes in winter, the slow torment of starvation and cold not being classed legally as torture.[6]

Equally absolute was the maxim that torture could not be employed unless there was positive proof that crime of some sort had been committed, for its object was to ascertain the

[1] Goetzii Dissert. de Tortura, pp. 52–3.

[2] Zangeri Tract. Not. ad p. 903.

[3] Grillandi de Quæst. et Tortura Q. vii.

[4] Scialojæ *op. cit.* cap. i. No. 34.—Goetzii Dissert. de Tortura, p. 53.—Grillandi, *loc. cit.*—Bernhard (Diss. Inaug. de Tort. cap. i. § iv.) states that in these cases not only the principals but even the witnesses could be tortured if suspected of concealing the truth.

[5] Grillandi de Quæst. et Tortura, Q. v. § 6.

[6] Baldi de Periglis de Quæstionibus cap. iii. § 2.—Damhoud. cap. xxxviii. No. 13.—Alberti de Gandino de Quæstionibus § 31.

criminal and not the crime;[1] yet von Rosbach remarks that as soon as any one claimed to have lost anything by theft, the judges of his day hastened to torture all suspect, without waiting to determine whether or not the theft had really been committed as assumed;[2] and von Boden declares that many tribunals were in the habit of resorting to it in cases wherein subsequent developments showed that the alleged crime had really not taken place, a proceeding jocosely characterized by a brother lawyer as putting the cart before the horse, and bridling him by the tail.[3] The history of torture is full of cases illustrating its effectiveness when thus used. Boyvin du Villars relates that during the war in Piedmont, in 1559, he released from the dungeons of the Marquis of Masserano an unfortunate gentleman who had been secretly kept there for eighteen years, in consequence of having attempted to serve a process from the Duke of Savoy on the marquis. His disappearance having naturally been attributed to foul play, his kindred prosecuted an enemy of the family, who, under stress of torture, duly confessed to having committed the murder, and was accordingly executed in a town where Masserano himself was residing.[4] Godelmann relates that a monument in a church in upper Germany, representing a man broken on a wheel, commemorated a case in which two young journeymen set out together to make the accustomed tour of the country. One of them returned alone, clad in the garments of the other, and was suspected of having made way with him. He was arrested, and in the absence of all other evidence was promptly put to the torture, when he confessed the crime in all its details and was executed on the wheel—soon after which his companion returned. Another case was that of a young

[1] Zangeri Præfat. No. 32.—Tortura enim datur non ad liquidandum factum sed personam.—Damhouder. Rer. Crimin. Prax. cap. xxxv. No. 7.

[2] Process. Criminal. Tit. v. cap. ix. No. 17.

[3] De Usu et Ab. Tort. Th. IX.—Qui aliter procedit judex, equum cauda frenat et post quadrigas caballum jungit.

[4] Boyvin du Villars, Mémoires, Liv. VII.

man near Bremen whose widowed mother lived in adultery with a servant. The son quarrelled with the man, who fled and took service with another employer at a considerable distance. His father, not knowing his departure, accused the youth of murder, and torture speedily drew from the latter a full confession of the crime, including his throwing the corpse into the Weser. Not long after his execution the adulterous serving-man reappeared and was duly put to death, as also was his father, to make amends for the blunder of the law.[1]

A universal prescription existed that the torment should not be so severe or so prolonged as to endanger life or limb or to injure the patient permanently; but this, like all the other precautions, was wholly nugatory. Senckenberg assures us that he was personally cognizant of cases in which innocent persons had been crippled for life by torture under false accusations;[2] and the meek Jesuit Del Rio, in his instructions to inquisitors, quietly observes that the flesh should not be wounded nor the bones broken, but that torture could scarce be properly administered without more or less dislocation of the joints.[3] We may comfort ourselves with the assurance of Grillandus, that cases were rare in which permanent mutilation or death occurred under the hands of the torturer,[4] and this admission lends point to the advice which Simancas gives to judges, that they should warn the accused, when brought into the torture-chamber, that if he is crippled or dies under the torture he must hold himself accountable for it in not spontaneously confessing the truth[5]—a warning which was habitually given in the Spanish Inquisition before applying the torture. Von Boden, moreover, very justly points out the impossibility of establishing any rules or limitations of practical utility, when the capacity of endurance varies so

[1] Godelmanni de Magis Lib. III. cap. x.

[2] Not. ad p. 907 Zangeri *op. cit.*

[3] Del Rio Magicar. Disquisit. Lib. v. sect. ix.

[4] Grillandi de Quæst. et Tortura, Q. vi. § 10.

[5] Simancæ de Cathol. Instit. Tit. LXV. No. 56.

greatly in different constitutions, and the executioners had so many devices for heightening or lessening, within the established bounds, the agony inflicted by the various modes of torture allowed by law. Indeed, he does not hesitate to exclaim that human ingenuity could not invent suffering more terrible than was constantly and legally employed, and that Satan himself would be unable to increase its refinements.[1] In this as in everything else the legists agreed that the discretion of the judge was the sole and final arbiter in deciding whether the accused was "competently" tortured—that is, whether the number and severity of the inflictions were sufficient to purge him of the adverse evidence.[2]

It is true that the old rules which subjected the judge to some responsibility were still nominally in force. When torture was ordered without a preliminary examination, or when it was excessive and caused permanent injury, the judge was held by some authorities to have acted through malice, and his office was no protection against reclamation for damages.[3] Zanger also quotes the Roman law as still in force, to the effect that if the accused dies under the torture, and the judge has been either bribed or led away by passion, his offence is capital, while if there had been insufficient preliminary evidence, he is punishable at discretion.[4] But, on the other hand, Baldo tells us that unless there is evidence of malice the presumption is in favor of the judge in whose hands a prisoner has died or been permanently crippled, for he is

[1] De Usu et Abusu Tort. Th. XIII.

It must not be supposed from this and the preceding extracts that von Boden was an opponent of torture on principle. Within certain bounds, he advocated its use, and he only deplored the excessive abuse of it by the tribunals of the day.

[2] Quando quis dicatur competenter tortus vel non, similiter quando quis dicatur purgasse indicia vel non, omnia ista demum relinquuntur arbitrio et discretioni honesti judicis, quoniam in his certa regula tradi non potest.—Grillandi de Quæst. et Tortura Q. vii. § 10.—Cf. Godelmanni de Magis Lib. III. cap. x. § 36.—Baldi de Periglis de Quæstionibus cap. i. § 5.

[3] Zangeri *op. cit.* cap. I. Nos. 42–44. [4] Ibid. cap. III. Nos. 20–22.

assumed to have acted through zeal for justice,[1] and though there were some authorities who denied this, it seems to have been the general practical conclusion.[2] The secrecy of criminal trials, moreover, offered an almost impenetrable shield to the judge, and the recital by Godelmann of the various kinds of evidence by which the prisoner could prove the fact that he had been subjected to torture shows how difficult it was to penetrate into the secrets of the tribunals.[3] According to Damhouder, indeed, the judge could clear himself by his own declaration that he had acted in accordance with the law, and without fraud or malice.[4] We are therefore quite prepared to believe the assertion of Senckenberg that the rules protecting the prisoner had become obsolete, and that he had seen not a few instances of their violation without there being any idea of holding the judge to accountability,[5] an assertion which is substantially confirmed by Goetz.[6]

Not the least of the evils of the system, indeed, was its inevitable influence upon the judge himself. He was required by his office to be present during the infliction of torture, and to conduct the interrogatory personally. Callousness to human suffering, whether natural or acquired, thus became a necessity, and the delicate conscientiousness which should be the moving principle of every Christian tribunal was well-nigh an impossibility.[7] Nor was this all, for when even a conscientious judge

[1] Baldi de Periglis cap. iii. § 7.

[2] Bonifacii de Vitalianis, Rubr. *de Perseverentia* § 5.—Alberti de Gandino, De Quæstionibus § 35.

[3] Godelmanni l. c. § 54.

[4] Cap. xxxviii. No. 18.

[5] Zangeri cap. III. Nos. 20–22.

[6] Goetzii Dissert. de Tortura, p. 74.

[7] So thoroughly was this recognized, that in 1668 Racine represents a judge, desirous of ingratiating himself with a young girl, as offering to exhibit to her the spectacle of the question as an agreeable pastime.

"DANDIN. N'avez vous jamais vu donner la question?
ISABELLE. Non, et ne le verrai, que je crois de ma vie.
DANDIN. Venez, je vous en veux faire passer l'envie.
ISABELLE. Hé! Monsieur, peut-on voir souffrir les malhereux?
DANDIN. Bon! cela fait toujours passer une heure ou deux."

Les Plaideurs, Acte III. Sc. dernière.

had once taken upon himself the responsibility of ordering a fellow-being to the torture, every motive would lead him to desire the justification of the act by the extortion of a confession;[1] and the very idea that he might be possibly held to accountability, instead of being a safeguard for the prisoner became a cause of subjecting him to additional agony. Indeed, the prudence of persevering in torture until a confession was reached was at least recognized, if not advised, by jurists, and in such a matter to suggest the idea was practically to recommend it.[2] Both the good and the evil impulses of the judge were thus enlisted against the unfortunate being at his mercy. Human nature was not meant to face such temptations, and the fearful ingenuity which multiplied the endless refinements of torture testifies how utterly humanity yielded to the thirst of wringing conviction from the weaker party to the unequal conflict, where he who should have been a passionless arbiter was made necessarily a combatant. How completely the prisoner thus became a quarry to be hunted to the death is shown by the jocular remark of Farinacci, a celebrated authority in criminal law, that the torture of sleeplessness, invented by Marsigli, was most excellent, for out of a hundred martyrs exposed to it not two could endure it without becoming confessors as well.[3] Few, when once engaged

[1] Fortescue, in his arguments against the use of torture, does not fail to recognize that the acquittal of a tortured prisoner is the condemnation of the judge—"qui judex eum pronuntiet innocentem, nonne eodem judicio judex ille seipsum reum judicat omnis sævitiæ et pœnarum quibus innocentem afflixit?"—De Laud. Legg. Angl. cap. xxii.

[2] Occurrit hic cautela Bruni dicentis, si judex indebite torserit aliquem, facit reum confiteri quod fuit legitime tortus, de qua confessione faciat notarium rogatum.—Rosbach. Process. Crim. Tit. v. cap. xv. No. 6.

[3] Quoted by Nicolas, Diss. Mor. et Jurid. sur la Torture, p. 21. This mode of torture consisted in placing the accused between two jailers, who pummelled him whenever he began to doze, and thus, with proper relays, deprived him of sleep for forty hours. Its inventor considered it humane, as it endangered neither life nor limb, but the extremity of suffering to which it reduced the prisoner is shown by its efficaciousness.

Marsigli received much credit for this ingenious invention. Grillandus

in such a pursuit, could be expected to follow the example of the Milanese judge, who resolved his doubts as to the efficacy of torture in evidence by killing a favorite mule, and allowing the accusation to fall upon one of his servants. The man of course denied the offence, was duly tortured, confessed, and persisted in his confession after torture. The judge, thus convinced by experiment of the fallacy of the system, resigned the office whose duties he could no longer conscientiously discharge, and in his subsequent career rose to the cardinalate. The mode in which these untoward results were usually treated is illustrated in another somewhat similar case which was told to Augustin Nicholas at Amsterdam in explanation of the fact that the city was obliged to borrow a headsman from the neighboring towns whenever the services of one were required for an execution. It appears that a young man of Amsterdam, returning home late at night from a revel, sank upon a doorstep in a drunken sleep. A thief emptied his pockets, securing, among other things, a dirk, with which, a few minutes

informs us that he experimented with it in a difficult case of two monks "et profecto vidi ea quæ prius non credebam, quod illud affert maximum tormentum et fastidium in corpore absque aliqua membrorum læsione."—Grillandi de Quæstione et Tortura Art. ii.

I have purposely abstained from entering into the details of the various forms of torture. They may be interesting to the antiquarian, but they illustrate no principle, and little would be gained by describing these melancholy monuments of human error. Those who may be curious in such matters will find ample material in Grupen Observat. Jur. Crim. de Applicat. Torment., 4to., Hanov. 1754; Zangeri *op. cit.* cap. IV. Nos. 9, 10; Hieron. Magius de Equuleo cum Appendd. Amstelod. 1664, etc. According to Bernhardi, Johann Graefe enumerates no less than six hundred different instruments invented for the purpose. Damhouder (*op. cit.* cap. xxxvii. Nos. 17–23) declares that torture can legally be inflicted only with ropes, and then proceeds to describe a number of ingenious devices. One of these, which he states to produce insufferable torment without risk, is bathing the feet with brine and then setting a goat to lick the soles.

The strappado, or suspension by the arms behind the back with weights to the feet, was the torture in most general use and most favored by legal experts.—Grillandus, *loc. cit.*

later, he stabbed a man in a quarrel. Returning to the sleeper he slipped the bloody weapon back to its place. The young man awoke, but before he had taken many steps he was seized by the watch, who had just discovered the murder. Appearances were against him; he was tortured, confessed, persisted in confession after torture, and was duly hanged. Soon after the real criminal was condemned for another crime, and revealed the history of the previous one, whereupon the States-General of the United Provinces, using the ordinary logic of the criminal law, deprived the city of Amsterdam of its executioner, as a punishment for a result that was inevitable under the system.[1]

Slight as were the safeguards with which legislators endeavored to surround the employment of torture, they thus became almost nugatory in practice under a system which, in the endeavor to reduce doubts into certainties, ended by leaving everything to the discretion of the judge. It is instructive to see the parade of insisting upon the necessity of strong preliminary evidence,[2] and to read the elaborate details as to the exact kind and amount of testimony severally requisite in each description of crime, and then to find that common report was held sufficient to justify torture, or unexplained absence before accusation, prevarication under examination, and even silence; and it is significant of the readiness to resort to the question on the slenderest pretexts when we see judges solemnly warned that an evil countenance, though it may argue depravity in general, does not warrant the presumption of actual guilt in individual cases;[3] though pallor, under many circumstances,

[1] Augustin Nicholas, *op. cit.* pp. 169, 178.

[2] Even this, however, was not deemed necessary in cases of conspiracy and treason "qui fiunt secreto, propter probationis difficultatem devenitur ad torturam sine indiciis"—Emer. a Rosb. Tit. v. cap. x. No. 20.

[3] Fama frequens et vehemens facit indicium ad torturam (Zanger. c. II. No. 80. Cf. Alberti de Gandino de Quæst. § 39). Reus ante accusationem vel inquisitionem fugiens et citatus contumaciter absens, se suspectum reddit ut torqueri possit (Ibid. No. 91. Cf. Simancæ Cathol. Instit. Tit. LXV. Nos.

was considered to sanction the application of torture,[1] even as a pot containing toads, found in the home of a suspected witch, justified her being placed on the rack.[2] In fact, witchcraft, poisoning, highway robbery, and other crimes difficult of proof, were considered to justify the judge in proceeding to torture on lighter indications than offences in which evidence was more readily obtainable.[3] Subtle lawyers thus exhausted their ingenuity in discussing all possible varieties of indications, and there grew up a mass of confused rules, wherein, on many points, each authority contradicted the other. In a system which thus waxed so complex, the discretion of the judge at last became the only practical guide, and the legal writers themselves acknowledge the worthlessness of the rules so laboriously constructed when they admit that it is left for his decision to determine whether the indications are sufficient to warrant the infliction of torture.[4] How absolute was this

28–30). Inconstantia sermonis facit indicium ad torturam (Zanger. Nos. 96–99). Ex taciturnitate oritur indicium ad torturam (Ibid. No. 103). Physiognomia malam naturam arguit, non autem delictum (Ibid. No. 85). How exceedingly lax was the application of these rules may be guessed from a remark of Damhouder's, that although rumor was sufficient to justify torture, yet a contrary rumor neutralized the first and rendered torture improper.—Damhouder. Rer. Crimin. Praxis cap. xxxv. Nos. 14, 15.

[1] Deinde a pallore et similibus oritur indicium ad torturam secundum Bartol. (Emer. a Rosbach Tit. v. c. vii. Nos. 28–31). Whereupon von Rosbach enters into a long dissertation as to the causes of paleness.

[2] Godelmanni de Magis Lib. III. cap. x. § 29.

[3] Scialojæ cap. iii. Nos. 5, 6.

[4] Judicis arbitrio relinquitur an indicia sint sufficientia ad torturam (Zanger. cap. II. Nos. 16–20). An indicia sufficiant ad torturam judicis arbitrio relictum est. . . . Indicia ad torturam sufficientia relinquuntur officio judicis (Emer. a Rosbach Tit. v. c. ii. p. 529). Damhouder, indeed, states that no rules can be framed—"neque ea ullis innituntur regulis: sed universum id negotium geritur penes arbitrium, discretionem ac conscientiam judicis."—Rer. Crimin. Praxis cap. xxxvi. Nos. 1, 2. Cf. Braune Dissert. de Tortura Valetudin. Halæ Cattor. 1740.

So Grillandus (De Quæstione et Tortura Q. iii.)—"Quæ autem indicia

discretion, and how it was exercised, is manifest when Damhouder declares that in his day bloodthirsty judges were in the habit of employing the severest torture without sufficient proof or investigation, boasting that by its means they could extract a confession of everything.[1] This fact was no novelty, for the practice had existed, we may say, since the first introduction of torture. Ippolito dei Marsigli early in the sixteenth century speaks of judges habitually torturing without preliminary evidence, and goes so far as to assert, with all the weight of his supreme authority, that a victim of such wrongs if he killed his inhuman judge could not be held guilty of homicide nor be punished with death for the slaying.[2] It was perhaps to avoid this responsibility that some of these zealous law-despisers resorted to the most irregular means to procure evidence. Godelmann and von Rosbach both tell us that the magistrates of their time, in the absence of all evidence, sometimes had recourse to sorcerers and to various forms of divination in order to obtain proof on which they could employ the rack or strappado. Boys whose shoes were newly greased with lard were thought to have a special power of detecting witches, and enthusiastic judges accordingly would sometimes station them, after duly anointing their boots, at the church doors, so that the luckless wretches could not get out without being recognized.[3]

How shocking was the abuse made of this arbitrary power is

dicantur esse sufficientia ad torturam certa regula tradi non potest, sed hoc relinquitur arbitrio et discretioni boni judicis."

And Albertus de Gandino (De Quæstionibus § 14)—"Nec de his possit dari certa doctrina sed hoc committitur arbitrio judicantis."

[1] Sunt tamen nonnulli prætores et judices sanguine fraterno adeo inexsaturabiles ut illico quemvis malæ famæ virum, citra ulla certa argumenta aut indicia, corripiant ad sævissimam torturam, inclementer dicentes, cruciatum facile ab illis extorturum rerum omnium confessionem.—Damhouder. Rer. Crimin. Praxis cap. xxxv. No. 13.

[2] Hipp. de Marsiliis Singularia, No. 455 (Venet. 1555).

[3] Godelmanni de Magis Lib. III. cap. v. § 26.—Emer. a Rosbach Tit. v. c. x. No. 25.

well illustrated by a case which occurred in the Spanish colony of New Granada about the year 1580. The judges of the royal court of Santafé had rendered themselves odious by their cruelty and covetousness, when one morning some pasquinades against them were found posted in the public plaza. Diligent search failed to discover the author, but a victim was found in the person of a young scrivener whose writing was thought to bear some resemblance to that of the offensive papers. He was at once seized, and though libel was not an offence under the civil law which justified the application of torture, he was ordered to the rack, when he solemnly warned the judge deputed to inflict it that if he should die under it he would summon his tormentor to answer in the presence of God within three days. The judge was intimidated and refused to perform the office, but another was found of sterner stuff, who duly performed his functions without extracting a confession, and the accused was discharged. Then a man who desired to revenge himself on an enemy asserted that the writing of the latter was like that of the pasquinades. Juan Rodriguez de los Puertos, the unfortunate thus designated, was immediately arrested with all his family. An illegitimate son was promptly tortured, and stated that his father had written the libels and ordered him to post them. Then Juan himself was ordered to the rack, but, while protesting his innocence, he begged rather to be put to death, as he was too old to endure the torment. He was accordingly hanged, and his son was scourged with two hundred lashes. All that was needed to render manifest the hideous injustice of this proceeding was developed a few years later, when the judge who was afraid to risk the appeal of the first victim was condemned to death for an assassination, and on the scaffold confessed that he himself had been the author of the libels against his brother justices.[1]

[1] Groot, Historia Eclesiastica y Civil de Nueva Granada, Bogotá, 1869, T. I. pp. 114–5, 116–20. Cf. Scialojæ Praxis torquendi Reos, cap. i. No. 25.

Such a system tends of necessity to its own extension, and it is therefore not surprising to find that the aid of torture was increasingly invoked. The prisoner who refused to plead, whether there was any evidence against him or not, could be tortured until his obstinacy gave way.[1] Even witnesses were not spared, whether in civil suits or criminal prosecutions.[2] It was discretionary with the judge to inflict moderate torture on them when the truth could not otherwise be ascertained. Witnesses of low degree could always be tortured for the purpose of supplying the defect in their testimony arising from their condition of life. Some jurists, indeed, held that no witness of low or vile condition could be heard without torture, but others maintained that poverty alone was not sufficient to render it necessary. Witnesses who were infamous could not be admitted to testify without torture; those of good standing were tortured only when they prevaricated, or when they were apparently committing perjury;[3] but, as this was necessarily left with the judges to determine, the instructions for him to guide his decision by observing their appearance and manner show how completely the whole case was in his power, and how readily he could extort evidence to justify the torture of the prisoner, and then extract from the latter a confession by the same means. In prosecutions for treason, all witnesses, irrespective of their rank, were liable to torture,[4] so that when Pius IV., in 1560, was determined to ruin Cardinal Carlo Caraffa, no scruple was felt, during his trial, as to torturing his friends and retainers to obtain the evidence upon which he was executed.[5] There

[1] Rosbach Tit. v. cap. x. No. 2.

[2] Ibid. Tit. v. cap. xiv. No. 16.—Goetzii Dissert. de Tortura, p. 54.—Grillandi de Quæst. et Tortura, Q. vii.

[3] Scialojæ cap. xiv. Nos. 5–20.—Jo. Frid. Werner Dissert. de Tortura Testium, Erford. 1724, pp. 72 sqq.

[4] Passerini Regulare Tribunal, Quæst. xv. Art. ix. No. 115 (Colon. Agripp. 1665).

[5] Process. contr. Card. de Caraffa (Hoffman. Collect. Script. I. 632).

was a general rule that witnesses could not be tortured until after the examination of the accused, because, if he confessed, their evidence was superfluous; but there were exceptions even to this, for if the criminal was not within the power of the court, witnesses could be tortured to obtain evidence against him in his absence.[1] Indeed, in the effort made early in the sixteenth century to reform the abuse of torture in Bologna, it was provided that if there were evidence to show that a man was acquainted with a crime he could be tortured to obtain evidence on which to base a prosecution, and this before any proceedings had been commenced against the delinquent.[2] Evidently there was no limit to the uses to which torture could be put by a determined legislator.

An ingenious plan was also adopted by which, when two witnesses gave testimony irreconcilable with each other, their comparative credibility was tested by torturing both simultaneously in each other's presence.[3] Evidence given under torture was esteemed the best kind, and yet with the perpetually recurring inconsistency which marks this branch of criminal law it was admitted that the spontaneous testimony of a man of good character could outweigh that of a disreputable person under torment.[4] Witnesses, however, could not be tortured more than three times;[5] and it was a question mooted between jurists whether their evidence thus given required, like the confession of an accused person, to be subsequently ratified by them.[6] A reminiscence of Roman law, moreover, is visible in the rule that no witness could be tortured against his kindred to the seventh degree, nor against his near connections by marriage, his feudal superiors, or other similar persons.[7]

There doubtless was good reason underlying the Roman

[1] Scialojæ c. xiv. No. 2.

[2] Statuta Criminalia Communis Bononiæ (Bononiæ 1525, p. 15 *b*).

[3] Damhouder, *op. cit.* cap. xlvii. No. 3.

[4] Passerini, *loc cit.* Nos. 122–3.

[5] Ibid. No. 118.

[6] Simancæ de Cathol. Instit. Tit. LXV. No. 73.

[7] Zangeri, *op. cit.* I. Nos. 8–25.

rule, universally followed by modern legists, that, whenever several parties were on trial under the same accusation, the torturer should commence with the weakest and tenderest, for thus it was expected that a confession could soonest be extracted; but this eager determination to secure conviction gave rise to a refinement of cruelty in the prescription that if a husband and wife were arraigned together, the wife should be tortured first, and in the presence of her husband; and if a father and son, the son before his father's face.[1]

Grillandus, who seems to have been an unusually humane judge, describes five degrees of torture, using as a standard the favorite strappado. The first is purely mental—stripping the prisoner and tying his hands behind him to the rope, but not hurting him. This can be used when there is no evidence, and he tells us he had found it very efficacious, especially with the timid and infirm. The other grades are indicated in accordance with the strength of the proof and the heinousness of the crime. The second is hoisting the accused and letting him hang for the space of an Ave or a Pater Noster, or even a Miserere, but not elevating him and letting him fall with a jerk. In the third grade this suspension is prolonged. In the fourth he is allowed to hang for a time varying from a quarter of an hour to an hour, according to the crime and the evidence, and he is jerked two or three times. In the fifth and severest form a weight is attached to his feet and he is repeatedly jerked. This Grillandus describes as terrible; the whole body is torn, the limbs are ready to part from the trunk, and death itself is preferable. It should only, he says, be used in the gravest crimes, such as heresy or treason, but we have already seen that it was mild in comparison with many inflictions habitually employed.[2]

[1] Zangeri cap. IV. Nos. 25–30.—Damhouder, *op. cit.* cap. xxxvii. Nos. 15, 16.—Baldi de Periglis de Quæstionibus, cap. i. § 7.—Alberti de Gandino de Quæstionibus § 11.

[2] Grilland. de Quæstione et Tortura Q. iv. §§ 2–10. "Quod tunc corpus ipsius rei dilaniatur membraque et ossa quodammodo dissolvuntur et evelluntur a corpore."

Some facilities for defence were allowed to the accused, but in practice they were almost hopelessly slender. He was permitted to employ counsel, and if unable to do so, it was the duty of the judge to look up testimony for the defence.[1] After all the adverse testimony had been taken, and the prisoner had been interrogated, he could ask to see a copy of the proceedings, in order to frame a defence; but the request could be refused, in which case, the judge was bound to sift the evidence himself, and to investigate the probabilities of innocence or guilt. Von Rosbach states that judges were not in the habit of granting the request, though no authority justified them in the refusal;[2] and half a century later this is confirmed by Bernhardi, who gives as a reason that by withholding the proceedings from the accused they saved themselves trouble.[3] The right of the accused to see the evidence adduced against him was still an open question so recently as 1742, for Goetz deems it necessary to argue at some length to prove it.[4] The recognized tendency of such a system to result in an unfavorable conclusion is shown by Zanger's elaborate instructions on this point, and his warning that, however justifiable torture may seem, it ought not to be resorted to without at least looking at the evidence which may be attainable in favor of innocence;[5] while von Rosbach characterizes as the greatest fault of the tribunals of his day, their neglect to obtain and consider testimony for the accused as well as against him.[6] Indeed, when the public interest was deemed to require it, all safeguards were withdrawn from

[1] Zangeri, *op. cit.* cap. III. No. 3.

[2] Process. Criminal. Tit. v. cap. x. No. 7.

We have already seen (p. 514) that in France the accused was not allowed to see the evidence against him; and the same rule was in force in Flanders—"Toutes depositions de tesmoins en causes criminelles demeureront secrétes à l'égard de l'accusé."—Coutume d'Audenarde, Stile de la Procedure, Art. 10. (Le Grand, Coutumes de Flandre, Cambrai, 1719, p. 103).

[3] Diss. Inaug. cap. I. § xii.

[4] Goetzii, *op. cit.* p. 36.

[5] Zangeri, *op. cit.* cap. III. Nos. 1, 4, 5–43.

[6] Process. Crim. Tit. v. cap. xi. No. 6.

the prisoner, as when, in 1719 in Saxony, a mandate was issued declaring that in cases of thieves and robbers no defence or exceptions or delays were to be admitted.[1] In some special and extraordinary cases, the judge might allow the accused to be confronted with the accuser, but this was so contrary to the secrecy required by the inquisitorial system, that he was cautioned that it was a very unusual course, and one not lightly to be allowed, as it was odious, unnecessary, and not pertinent to the trial.[2]

Theoretically, there was a right of appeal against an order to inflict torture, but this, even when permitted, could usually avail the accused but little, for the *ex parte* testimony which had satisfied the lower judge could, of course, in most instances, be so presented to the higher court as to insure the affirmation of the order, and prisoners, in their helplessness, would doubtless feel that by the attempt to appeal they would probably only increase the severity of their inevitable sufferings.[3] Moreover, such appeals were ingeniously and effectually discouraged by subjecting the advocate of the prisoner to a fine or some extraordinary punishment if the appeal was pronounced to be frivolous;[4] and some authorities, among which was the great name of Carpzovius, denied that in the inquisitorial process there was any necessity of communicating to the accused the order to subject him to torture and then allow him time to appeal against it if so disposed.[5]

Slender as were these safeguards in principle, they were reduced in practice almost to a nullity. That the discretion lodged in the tribunals was habitually and frightfully abused is only too evident, when von Rosbach deems it necessary to reprove, as a common error of the judges of his time, the

[1] Goetzii, *op. cit.* p. 35.

[2] Zangeri cap. II. Nos. 49–50.—Cum enim confrontatio odiosa sit et species suggestionis, et remedium extraordinarium ad substantiam processus non pertinens, et propterea non necessaria.

[3] Zangeri, cap. IV. Nos. 1–6. [4] Goetzii Dissert. de Tortura, p. 34.

[5] Braune Dissert. de Tortura Valetudin. p. 16.

idea that the use of torture was a matter altogether dependent upon their pleasure, "as though nature had created the bodies of prisoners for them to lacerate at will."[1] Thus it was an acknowledged rule that when guilt could be satisfactorily proved by witnesses, torture was not admissible;[2] yet Damhouder feels it necessary to condemn the practice of some judges, who, after conviction by sufficient evidence, were in the habit of torturing the convict, and boasted that they never pronounced sentence of death without having first extorted a confession.[3] Moreover, the practice was continued which we have seen habitual in the Châtelet of Paris in the fourteenth century, whereby, after a man had been duly convicted of a capital crime, he was tortured to extract confessions of any other offences of which he might be guilty;[4] and as late as 1764, Beccaria lifts his voice against it as a still existing abuse, which he well qualifies as senseless curiosity, impertinent in the wantonness of its cruelty.[5] Martin Bernhardi, writing in 1705, asserts that this torture after confession and conviction was also resorted to in order to prevent the convict from appealing from the sentence.[6] So, although a man who freely confessed a crime could not be tortured, according to the general principle of the law, still, if in his confession he ad-

[1] Process. Crimin. Tit. v. cap. ix. No. 10. [2] Zangeri cap. i. No. 37.

[3] Rer. Crimin. Praxis cap. xxxviii. Nos. 6, 7.

[4] Boden de Usu et Abusu Torturæ Th. XII. Damhouder declares this practice to be unjustifiable, though not infrequent (Rer. Crimin. Praxis cap. xxxvii. No. 12).—Bonifazio de' Vitaliani speaks of it as a common but evil custom.—De Quæstionibus, Rubr. *Quæ indicia*, § 7.

[5] He represents the judge as addressing his victim "Tu sei il reo di un delitto, dunque è possibile che lo sii di cent' altri delitti: questo dubbio mi pesa, voglio accertarmene col mio criterio di verità: le leggi ti tormentano, perche sei reo, perche puoi esser reo, perche voglio che tu sii reo."—Dei Delitti e delle Pene, § XII.

[6] Martini Bernhardi Diss. Inaug. de Tortura cap. i. § 4. Scialoja, in 1653, assures us that this torture after confession to prevent appeals was no longer permitted in the Neapolitan courts, and that it was only allowed for the discovery of accomplices (Praxis torquendi Reos. c. i. Nos. 8–10).

duced mitigating circumstances, he could be tortured in order to force him to withdraw them;[1] and, moreover, if he were suspected of having accomplices and refused to name them, he could be tortured as in the *question préalable* of the French courts.[2] Yet the accusation thus obtained was held to be of so little value that it only warranted the arrest of the parties incriminated, who could not legally be tortured without further evidence.[3] In the face of all this it seems like jesting mockery to find these grim legists tenderly suggesting that the prisoner should be tortured only in the morning lest his health should suffer by subjecting him to the question after a full meal.[4]

If the practice of the criminal courts had been devised with the purpose of working injustice under the sacred name of law it could scarce have been different. Even the inalienable privilege of being heard in his defence was habitually refused to the accused by many tribunals, which proceeded at once to torture after hearing the adverse evidence, a refinement of cruelty and injustice which called forth labored arguments by von Rosbach and Simancas to prove its impropriety, thus showing it to be widely practised.[5] In the same way, the right to appeal from an order to torture was evaded by judges, who sent the prisoner to the rack without a preliminary formal order, thus depriving him of the opportunity of appealing.[6] Indeed, in time it was

[1] Scialojæ, *op. cit.* cap. i. No. 14.

[2] Damhouder, Rer. Crimin. Prax. cap. xxxv. No. 9, cap. xxxviii. No. 14.—Werner Dissert. de Tortura Testium, pp. 76 sqq.

[3] Damhoud. cap. xxxix. No. 6.

[4] Goetzii Dissert. de Tortura, p. 26.

[5] Emer. a Rosbach Process. Criminal. Tit. v. cap. x. Nos. 8–16.—Simancæ Cath. Inst. LXV. 17.

[6] Bernhardi, *loc. cit.* The difference between the practice and principles of the law is shown by the rules laid down in 1647 by Brunnemann, coexisting with the above. He directs that the proceedings are to be exhibited to the accused or his friends, and then submitted to a college of jurists who are to decide as to the necessity of torture, and he warns the latter that they can have no graver question placed before them—"Et sane

admitted by many jurists that the judge at his pleasure could refuse to allow an appeal; and that in no case was he to wait more than ten days for the decision of the superior tribunal.[1]

The frequency with which torture was used is manifested in the low rate which was paid for its application. In the municipal accounts of Valenciennes, between 1538 and 1573, the legal fee paid to the executioner for each torturing of a prisoner is only two sous and a half, while he is allowed the same sum for the white gloves worn at an execution, and ten sous are given him for such light jobs as piercing the tongue.[2]

With all this hideous accumulation of cruelty which shrank from nothing in the effort to wring a confession from the wretched victim, that confession, when thus so dearly obtained, was estimated at its true worthlessness. It was insufficient for conviction unless confirmed by the accused in a subsequent examination beyond the confines of the torture-chamber, at an interval of from one to three days.[3] This confirmation was by no means universal, and the treatment of cases of retracted confession was the subject of much debate. Bodin, in 1579, complains that witches sometimes denied what they had confessed under torture, and that the puzzled judge was then obliged to release them.[4] Such a result, however, was so totally at variance with the determination to obtain a conviction which marks the criminal jurisprudence of the period that it was not likely to be submitted to with patience. Accordingly the general practice was that, if the confession was retracted, the accused was again tortured, when a second confession and retraction made an exceedingly awkward

nullam graviorem puto esse deliberationem in Collegiis Juridicis quam ubi de tortura infligenda agitur."—Brunneman. de Inquisitionis Processu cap. VIII. Memb. iv. No. 10; Memb. v. No. 1.

[1] Passerini Regulare Tribunal; Praxis, cap. viii. No. 170.

[2] Louïse, Sorcellerie et Justice Criminelle à Valenciennes (Valenciennes, 1861, pp. 121–125).

[3] Goetzii Diss. de Tortura, p. 71.

[4] Bodin de Magor. Dæmonom. (Basil. 1581, p. 325).

dilemma for the subtle jurisconsults. They agreed that he should not be allowed to escape after giving so much trouble. Some advocated the regular punishment of his crime, others demanded for him an extraordinary penalty; some, again, were in favor of incarcerating him;[1] others assumed that he should be tortured a third time, when a confession, followed as before by a recantation, released him from further torment, for the admirable reason that nature and justice alike abhorred infinity.[2] This was too metaphysical for some jurists, who referred the whole question to the discretion of the judge, with power to prolong the series of alternate confession and retraction indefinitely, acting doubtless on the theory that most prisoners were like the scamp spoken of by Ippolito dei Marsigli, who, after repeated tortures and revocations, when asked by the judge why he retracted his confession so often, replied that he would rather be tortured a thousand times in the arms than once in the neck, for he could easily find a doctor to set his arm but never one to set his neck.[3] The magistrates in some places were in the habit of imprisoning or banishing such persons, thus punishing them without conviction, and inflicting a penalty unsuited to the crime of which they were accused.[4] Others solved the knotty problem by judiciously advising that in the uncertainty of doubt as to his guilt, the prisoner should be soundly scourged and turned

[1] Zangeri cap. v. Nos. 79–81.

[2] Bernhardi Diss. Inaug. cap. i. § xi.

[3] Emer. a Rosbach, *op. cit.* Tit. v. cap. xviii. No. 13.—Godelmanni de Magis L. iii. cap. x. § 52.—Gerstlacheri Comment. de Quæst. per Tormenta, p. 35.—Grillandi de Quæst. et Tortura Q. vii. § 11. So Beccaria (Delitt. e Pene, § xii.)—"Alcuni dottori ed alcune nazioni non permettono questa infame petizione di principio che per tre volte; altre nazioni ed altri dottori la lasciano ad arbitrio del giudice."

[4] This custom prevailed in Electoral Saxony until the abrogation of torture (Goetzii Diss. de Tort. p. 33), and was especially the case at Amsterdam. Meyer (Institutions Judiciaires, IV. 295) states that the registers there afford scarcely an instance of a prisoner discharged without conviction after enduring torture.

loose, after taking an oath not to bring an action for false imprisonment against his tormentors;[1] but, according to some authorities, this kind of oath, or *urpheda* as it was called, was of no legal value.[2] Towards the end of the torture system, however, the more humane though not very logical doctrine prevailed in Germany that a retraction absolved the accused, unless new and different evidence was brought forward, and this had to be stronger and clearer than before, for the presumption of innocence was now with the accused, the torture having purged him of former suspicion.[3]

This necessity of repeating a confession after torture gave rise to another question which caused considerable difference of opinion among doctors, namely, whether witnesses who were tortured had to confirm their evidence subsequently, and whether they, in case of retraction or the presentation of fresh evidence, could be tortured repeatedly. As usual in doubts respecting torture, the weight of authority was in favor of its most liberal use.[4]

There were other curious inconsistencies in the system which manifest still more clearly the real estimate placed on confessions under torture. If the torture had been inflicted by an over-zealous judge without proper preliminary evidence, confession amounted legally to nothing, even though proofs were subsequently discovered.[5] If, on the other hand, absolute and incontrovertible proof of guilt were had, and the over-zealous judge tortured in surplusage without extracting a confession, there arose another of the knotty points to which the torture system inevitably tended and about which jurisconsults dif-

[1] Zanger. *loc. cit.*

[2] Bernhardi, cap. I. § xii.—Goetzii *op. cit.* p. 74.—Cf. Caroli V. Const. Crim. cap. XX. § 1.—Goetz (p. 67) derives *urpheda* from *ur* before, and *fede* enmity.

[3] Goetzii Dissert. de Tortura, p. 31.

[4] Werner. Dissert. de Tortura, pp. 91–2.

[5] Zangeri cap. II. Nos. 9–10; cap. V. Nos. 19–28.—Damhouder. *op. cit.* cap. xxxvi. No. 36.—Baldi de Periglis de Quæstionibus cap. ii. § 9.

fered. Some held that he was to be absolved, because torture purged him of all the evidence against him; others argued that he was to be punished with the full penalty of his crime, because the torture was illegal and therefore null and void; others again took a middle course and decided that he was to be visited, not with the penalty of his crime, but with something else, at the discretion of his judge.[1] According to law, indeed, torture without confession was a full acquittal; but here, again, practice intervened to destroy what little humanity was admitted by jurists, and the accused under such circumstances was still held suspect, and was liable at any moment to be tried again for the same offence.[2] Indeed, at a comparatively early period after the introduction of torture, we are told that if the accused endured it without confession he was to be kept in prison to see whether new evidence might not turn up: if none came, then the judge was to assign him a reasonable delay for his defence; he was regularly tried, when if convicted he was punished; if not he was discharged.[3] If, again, a man and woman were tortured on an accusation of adultery committed with each other, and if one confessed while the other did not, both were acquitted according to some authorities, while others held that the one who confessed should receive some punishment different from that provided for the crime, while the accomplice was to be discharged on taking a purgatorial oath.[4] Nothing more contradictory and illogical can well be imagined, and, as if to crown the absurdity of the

[1] Zangeri cap. v. Nos. 1–18.—Goetzii Dissert. de Tortura, pp. 67–9.

[2] Damhouder. *op. cit.* cap. xl. No. 3.—Bigotry and superstition, especially, did not allow their victims to escape so easily. In accusations of sorcery, if appearances were against the prisoner—that is, if he were of evil repute, if he shed no tears during the torture, and if he recovered speedily after each application—he was not to be liberated because no confession could be wrung from him, but was to be kept for at least a year, "squaloribus carceris mancipandus et cruciandus, sæpissime etiam examinandus, præcipue sacratioribus diebus."—Rickii Defens. Aq. Probæ cap. i. No. 22.

[3] Alberti de Gandino de Quæstionibus § 21.

[4] Zangeri cap. v. No. 53–61.—Goetzii Dissert. de Tortura, p. 57.

whole, torture after conviction was allowed in order to prevent appeals; and if the unfortunate, at the place of execution, chanced to assert his innocence, he was often hurried from the scaffold to the rack in obedience to the theory that the confession must remain unretracted;[1] though, if the judge had taken the precaution to have the prisoner's ratification of his confession duly certified to by a notary and witnesses, this trouble might be avoided, and the culprit be promptly executed in spite of his retraction.[2] One can scarce repress a grim smile at finding that this series of horrors had pious defenders who urged that a merciful consideration for the offender's soul required that he should be brought to confess his iniquities in order to secure his eternal salvation.[3] It was a minor, yet none the less a flagrant injustice, that when a man had endured the torture without confession, and was therefore discharged as innocent, he or his heirs were obliged to defray the whole expenses of his prosecution.[4]

The atrocity of this whole system of so-called criminal justice is forcibly described by the honest indignation of Augustin Nicolas, who, in his judicial capacity under Louis XIV., had ample opportunities of observing its practical working and results. "The strappado, so common in Italy, and which yet is forbidden under the Roman law . . . the vigils of Spain, which oblige a man to support himself by sheer muscular effort for seven hours, to avoid sitting on a pointed iron, which pierces him with insufferable pain; the vigils of Florence, or of Marsiglio, which have been described above; our iron stools heated to redness, on which we place poor half-witted women accused of witchcraft, exhausted by

[1] Boden, *op. cit.* Th. v. vi.

[2] Goetzii Dissert. de Tortura, p. 72.

[3] Boden, *op. cit.* Th. v. vi.

[4] Goetzii Dissert. de Tortura, p. 76. Distinction was sometimes made between crimes involving death or corporal punishment and those of lighter grade, but Goetz states that in his time (1742) in Saxony the above was the received practice.

frightful imprisonment, rotting from their dark and filthy dungeons, loaded with chains, fleshless, and half dead; and we pretend that the human frame can resist these devilish practices, and that the confessions which our wretched victims make of everything that may be charged against them are true."[1] Under such a scheme of jurisprudence, it is easy to understand and appreciate the case of the unfortunate peasant, sentenced for witchcraft, who, in his dying confession to the priest, admitted that he was a sorcerer, and humbly welcomed death as the fitting retribution for the unpardonable crimes of which he had been found guilty, but pitifully inquired of the shuddering confessor whether one could not be a sorcerer without knowing it.[2]

If anything were wanting to show how completely the inquisitorial process turned all the chances against the accused, it is to be found in the quaint advice given by Damhouder. He counsels the prisoner, when required to plead, to prevent his judge from taking advantage of any adverse points that might occur, as, for instance, in a charge of homicide to assert his innocence, but to add that, if he were proved to have committed the crime, he then declares it to have been done in self-defence.[3]

We have seen above how great was the part of the Inquisition in introducing and moulding the whole system of torture on the ruins of the feudal law. Even so, in the reconstruction of European jurisprudence, during the sixteenth and seventeenth centuries, the ardor of the inquisitorial proceedings against witchcraft, and the panic on the subject which long pervaded Christendom, had a powerful influence in familiarizing the minds of men with the use of torture as a necessary instrument of justice, and in authorizing its employment to an extent which now is almost inconceivable.

[1] Dissert. Mor. et Jurid. sur la Torture, pp. 36–7.

[2] Ibid. p. 169.

[3] Damhoud. Rer. Criminal. Prax. cap. 34, § 7.

From a very early period, torture was recognized as indispensable in all trials for sorcery and magic. In 358, an edict of Constantius decreed that no dignity of birth or station should protect those accused of such offences from its application in the severest form.[1] How universal its employment thus became is evident from a canon of the council of Merida, in 666, declaring that priests, when sick, sometimes accused the slaves of their churches of bewitching them, and impiously tortured them against all ecclesiastical rules.[2] It was, therefore, natural that all such crimes should be regarded as peculiarly subjecting all suspected of them to the last extremity of torture, and its use in the trials of witches and sorcerers came to be regarded as indispensable.

The necessity which all men felt that these crimes should be extirpated with merciless severity, and the impalpable nature of the testimony on which the tribunals had mostly to depend, added to this traditional belief in the fitness of torture. Witchcraft was considered as peculiarly difficult of proof, and torture consequently became an unfailing resource to the puzzled tribunal, although every legal safeguard was refused to the wretched criminal, and the widest latitude of evidence was allowed. Bodin expressly declares that in so fearful a crime no rules of procedure are to be observed.[3] Sons were admitted to testify against their fathers, and young girls were regarded as the best of witnesses against their mothers; the disrepute of a witness was no bar to the reception of his testimony, and even children of irresponsible age

[1] Const. 7 Cod. IX. xviii.

[2] Concil. Emeritan. ann. 666 can. xv.

In the middle of the thirteenth century, the Emperor Theodore Lascaris invented a novel mode of torture in a case of this kind. When a noble lady of his court was accused of sorcery, he caused her to be inclosed naked in a sack with a number of cats. The suffering, though severe, failed to extort a confession.—Georg. Pachymeri Hist. Mich. Palæol. Lib. I. cap. xii.

[3] Bodini de Magorum Dæmonoman. Lib. IV. cap. 2.

were allowed to swear before they rightly knew the nature of the oath on which hung the life of a parent. Boguet, who presided over a tribunal in Franche Comté, in stating this rule relates a most pathetic case of his own in which a man named Guillaume Vuillermoz was convicted on the testimony of his son, aged twelve, and the hardened nerves of the judge were wrung at the despair of the unhappy prisoner on being confronted with his child, who persisted in his story with a callousness only to be explained by the will of God, who stifled in him all natural affection in order to bring to condign punishment this most hideous offence.[1] Louïse prints the records of a trial in 1662, wherein Philippe Polus was condemned on the evidence of his daughter, a child in her ninth year. There seems to have been no other proof against him, and according to her own testimony the girl had been a sorceress since her fourth year.[2] Even advocates and counsel could be forced to give evidence against their clients.[3] Notwithstanding the ample resources thus afforded for conviction, Jacob Rickius, who, as a magistrate during an epidemic of witchcraft, at the close of the sixteenth century, had the fullest practical experience on the subject, complains that no reliance could be placed on legal witnesses to produce conviction;[4] and Del Rio only expresses the general opinion when he avers that torture is to be more readily resorted to in witchcraft than in other crimes, in consequence of the extreme difficulty of its proof.[5]

Even the wide-spread belief that Satan aided his worshippers

[1] Boguet, Discours des Sorciers, chap. lv. (Lyon, 1610).

[2] Louïse, La Sorcellerie et la Justice Criminelle à Valenciennes (Valenciennes, 1861, pp. 133–64).—For other similar instances see Bodin, *op. cit.* Lib. IV. cap. 1, 2.

[3] Bodin. Lib. I. cap. 2.

[4] Per legales testes hujus rei ad convincendum fides certa haberi non potest.—Rickii Defens. Aquæ Probæ cap. III. No. 117.

[5] Idque facilius in excepto et occulto difficilisque probationis crimine nostro sortilegii admiserim quam in aliis.—Disquisit. Magicar. Lib. V. Sect. iii. No. 8.

in their extremity by rendering them insensible to pain did not serve to relax the efforts of the extirpators of witchcraft, though they could hardly avoid the conclusion that they were punishing only the innocent, and allowing the guilty to escape. Boguet, indeed, seems to recognize this practical inconsistency, and, though it is permissible to use torture even during church festivals, he advises the judge not to have recourse to it because of its inutility.[1] How little his advice was heeded, and how little the courts deemed themselves able to dispense with torture, is shown in the charter of Hainault of 1619 where in these cases the tribunal is authorized to employ it to ascertain the truth of the charge, or to discover accomplices, or *for any other purpose*.[2] In this dilemma, various means were adopted to circumvent the arch enemy, of which the one most generally resorted to was that of shaving the whole person carefully before applying the torture,[3] a process which served as an excuse for the most indecent outrages upon female prisoners. Yet notwithstanding all the precautions of the most experienced exorcists, we find in the bloody farce of Urbain Grandier that the fiercest torments left him in capital spirits and good humor.[4] Damhouder relates at much length a curious case which occurred under his own eyes while member of the council of

[1] Boguet, Instruction pour un juge en faict de Sorcelerie, art. xxxii.

[2] Soit pour ne trouver les délitz suffisament vérifiez, ou pour savoir tous les complices, *ou autrement*.—Chart. nouv. du Haynau, chap. 125, art. xxvi. (Louïse, p. 94).

[3] Nicolas, p. 145. The curious reader will find in Del Rio (Lib. v. Sect. ix.) ample details as to the arts of the Evil One to sustain his followers against the pious efforts of the Inquisition.

[4] "Q'après qu'on eut lavé ses jambes, qui avoient été déchirées par la torture, et qu'on les eut présentées au feu pour y rapeller quelque peu d'esprits et de vigueur, il ne cessa pas de s'entretenir avec ses Gardes, par des discours peu sérieux et pleins de railleries; qu'il mangea avec apétit et but avec plaisir trois ou quatre coups; et qu'il ne répandit aucuns larmes en souffrant la question, ni après l'avoir souffert, lors même qu'on l'exorcisa de l'exorcisme des Magiciens, et que l'Exorciste lui dit à plus de cinquante reprises 'præcipio ut si sis innocens effundas lachrymas.'"—Hist. des Diables de Loudon, pp. 157–8.

Bruges, when he assisted at the torture of a reputed witch who had exercised her power only in good works. During three examinations, she bore the severest torture without shrinking, sometimes sleeping and sometimes defiantly snapping her fingers at the judges. At length, during the process of shaving, a slip of parchment covered with cabalistic characters was found concealed in her person, and on its removal she was speedily brought to acknowledge her pact with the Evil One.[1] The tender-hearted Rickius was so convinced of this source of uncertainty that he was accustomed to administer the cold-water ordeal to all the miserable old women brought before him on such charges, but he is careful to inform us that this was only preparatory proof, to enable him with a safer conscience to torture those who were so ill-advised as to float instead of sinking.[2] Grillandus tells us that he had met with cases in which the insensibility to the severest tortures was so complete that only magic arts could explain it; the patient seemed to be supported in the air, or to be in a profound stupor, and he mentions some of the formulas which were employed for the purpose. In one case at Rome a notorious thief suspected of a large robbery came to him voluntarily and said he wanted to purge himself of the rumors against him. He was tortured repeatedly in various ways; when the operation began he muttered something and fell into a stupor in which he was absolutely insensible. After exhausting his ingenuity, Grillandus had to discharge him. In another case the formula "Quemadmodum lac beatæ," etc., produced the same effect.[3]

[1] Rerum Crimin. Praxis Cap. xxxvii. Nos. 21, 22. Cf. Brunnemann. de Inquisit. Process. cap. VIII. Memb. v. No. 70.

[2] Rickii *op. cit.* cap. I. No. 24.

[3] Grillandi de Quæstione et Tortura, Art. iii. §§ 12–16. One of the conjurations is an allusion to the Crucifixion,

"Imparibus meritis tria pendent corpora ramis.
Dismas et Gestas, in medio est divina potestas.
Dismas damnatur, Gestas ad astra levatur."

From the time when the Cappadocians of old were said to harden their children with torture in order that they might profitably follow the profession of false witnesses, there existed so general a belief among experienced men that criminals of all kinds had secrets with which to deaden sensibility to torture that it is not improbable that the unfortunates occasionally were able to strengthen their endurance with some anæsthetic. Boguet complains that in modern times torture had become almost useless not only with sorcerers but with criminals in general, and Damhouder asserts that professional malefactors were in the habit of torturing each other in order to be hardened when brought to justice, in consequence of which he advises the judge to inquire into the antecedents of prisoners, in order to proportion the severity of the torture to the necessities of the case.[1]

When the concentrated energies of these ingenious and determined law dispensers failed to extort by such means a confession from the wretched clowns and gossips thus placed at their mercy, they were even yet not wholly at fault. The primitive teachings of the Inquisition of the thirteenth century were not yet obsolete; they were instructed to treat the prisoner kindly, and to introduce into his dungeon some prepossessing agent who should make friends with him and induce him to confess what was wanted of him, promising to influence the judge to pardon, when at that moment the judge is to enter the cell and to promise grace, with the mental reservation that his grace should be shown to the community and not to the prisoner.[2] Or, still following the ancient traditions, spies were

Another "Quemadmodum lac beatæ gloriosæ Mariæ virginis fuit dulce et suave domino nostro Jesu Christo, ita hæc tortura sit dulcis et suavis brachiis et membris meis."

[1] Boguet, Instruction pour un juge, art. xxix.—Damhouderi Rer. Crim. Prax. cap. xxxviii. No. 19.

[2] Sprenger Mall. Maleficar. P. III. q. xvi. This was directly in contradiction to the precepts of the civil lawyers. Ippolito dei Marsigli says positively that a confession uttered in response to a promise of pardon cannot be used

to be confined with him, who should profess to be likewise sorcerers and thus lead him to incriminate himself, or else the unhappy wretch was to be told that his associate prisoners had borne testimony against him, in order to induce him to revenge himself by turning witness against them.[1] Boguet, indeed, does not consider it correct to mislead the accused with promises of pardon, and though it was generally approved by legists, he decides against it.[2] Simancas also considers such artifices to be illegal, and that a confession thus procured could be retracted.[3] Del Rio, on the other hand, while loftily condemning the outspoken trickery recommended by Sprenger and Bodin, proceeds to draw a careful distinction between *dolum bonum* and *dolum malum*. He forbids absolute lying, but advises equivocation and ambiguous promises, and then, if the prisoner is deceived, he has only himself to thank for it.[4] In fact, these men conceived that they were engaged in a direct and personal struggle with the Evil One, and that Satan could only be overcome with his own arts.

When the law thus pitilessly turned all the chances against the victim, it is easy to understand that few escaped. In the existing condition of popular frenzy on the subject, there was no one but could feel that he might at any moment be brought under accusation by personal enemies or by unfortunates compelled on the rack to declare the names of all whom they might have seen congregated at the witches' sabbat. We can thus readily comprehend the feelings of those who, living under such uncertainties, coolly and deliberately made up their minds in advance that, if chance should expose them to suspicion,

against the accused (Singularia, Venet. 1555, fol. 36 *b*). The Church, however, did not consider itself bound by the ordinary rules of law or morality. Marsigli in another passage (fol. 30 *a*) relates that Alexander III. once secretly promised a bishop that if he would publicly confess himself guilty of simony he should have a dispensation, and on the prelate's doing so, immediately deposed him.

[1] Bodin. Lib. IV. cap. I. [2] Boguet, Instruction, art. xxvii.

[3] De Cathol. Instit. Tit. XIII. No. 12.

[4] Disquisit. Magicar. Lib. V. Sect. x.

they would at once admit everything that the inquisitors might desire of them, preferring a speedy death to one more lingering and scarcely less certain.[1] The evil fostered with such careful exaggeration grew to so great proportions that Father Tanner speaks of the multitude of witches who were daily convicted through torture;[2] and that this was no mere form of speech is evident when one judge, in a treatise on the subject, boasted of his zeal and experience in having dispatched within his single district nine hundred wretches in the space of fifteen years, and another trustworthy authority relates with pride that in the diocese of Como alone as many as a thousand had been burnt in a twelvemonth, while the annual average was over a hundred.[3]

Were it not for the steady patronage bestowed on the system by the Church, it would seem strange that torture should invade the quiet and holy retirement of the cloister. Its use, however, in monasteries was, if possible, even more arbitrary than in secular tribunals. Monks and nuns were exempt from the jurisdiction of the civil authorities, and were bound by vows of blind obedience to their superiors. The head of each convent thus was an autocrat, and when investigating the delinquencies of any of his flock he was subjected to no limitations. Not only could he order the accused to be tortured at will, but the witnesses, whether male or female, were liable to the same treatment, with the exception that in the case of nuns it was recommended that the tortures employed should not be indecent or too severe for the fragility of the sex. As elsewhere, it was customary to commence the torment with the weakest of the witnesses or criminals.[4]

[1] Father Tanner states that he had this from learned and experienced men.—Tanneri Tract. de Proc. adv. Veneficas, Quæst. II. Assert. iii. § 2.

[2] Ibid. *loc. cit.* [3] Nicolas, p. 164.

[4] Chabot, Encyclopédie Monastique, p. 426 (Paris, 1827). For instances see Angeli Rumpheri Hist. Formbach. Lib. II. (Pez, I. III. 446).—A. Molinier in Vaissette, Ed. Privat, IX. 417.

CHAPTER IX.

ENGLAND AND THE NORTHERN RACES.

In this long history of legalized cruelty and wrong the races of northern Europe are mostly exceptional. Yet it is somewhat remarkable that the first regular mediæval code in which torture is admitted as a means of investigation is the one of all others in which it would be least expected. The earliest extant law of Iceland, the Grágás, which dates from 1119, has one or two indications of its existence which are interesting as being purely autochthonic and in no sense derivable, as in the rest of Europe, from the Roman law. The character of the people, indeed, and of their institutions would seem to be peculiarly incompatible with the use of torture, for almost all cases were submitted to inquests or juries of the vicinage, and, when this was unsuitable, resort was had to the ordeal. The indigenous origin of the custom, however, is shown by the fact that while it was used in but few matters, the most prominent class subjected to it was that of pregnant women, who have elsewhere been spared by the common consent of even the most pitiless legislators. An unmarried woman with child, who refused to name her seducer, could be forced to do so by moderate torments which should not break or discolor the skin.[1] The object of this was to enable the family to obtain the fine from the seducer, and to save themselves from the expense of supporting the child. When the mother confessed, however, additional evidence was required to convict the putative father. When the inhabitants of a district, also, refused

[1] "Ita torquatur ut nec plagam referat nec color cutis livescat."—Grágás, Festathattr cap. xxxiii.

to deliver up a man claimed as an outlaw by another district, they were bound to torture him to ascertain the truth of the charge[1]—a provision doubtless explicable by the important part occupied by outlawry in all the schemes of Scandinavian legislation. These are the only instances in which it is permitted, while its occasional abuse is shown by a section providing punishment for its illegal employment.[2] Slaves, moreover, under the Icelandic, as under other codes, had no protection at law, and were at the mercy of their masters.[3] These few indications of the liability of freemen, however, disappear about the time when the rest of Europe was commencing to adopt the use of torture. In the *Jarnsida*, or code compiled for Iceland by Hako Hakonsen of Norway, in 1258, there is no allusion whatever to its use.

The Scandinavian nations, as a whole, did not admit torture into their systems of jurisprudence. The institution of the jury in various forms was common to all, and where proof upon open trial was deficient, they allowed, until a comparatively recent date, the accused to clear himself by sacramental purgation. Thus, in the Danish laws of Waldemar II., to which the date of 1240 is generally assigned, there is a species of permanent jury, *sandemend*, as well as a temporary one, *nefninge*, and torture seems to have formed no part of judicial proceedings.[4] This code was in force until 1683, when that of Christiern V. was promulgated. It is probable that the employment of torture may have crept in from Germany, without being regularly sanctioned, for we find Christiern forbidding its use except in cases of high treason, where the magnitude of the offence seems to him to justify the infraction of the general rule. He, however, encouraged one of its greatest abuses in permitting it on criminals condemned to death.[5]

[1] Grágás, Vigslothi cap. cxi. [2] Ibid. Vigslothi cap. lxxxviii.

[3] Schlegel Comment. ad Grágás § xxix.

[4] Legg. Cimbric. Woldemari Lib. II. cap. i. xl. (Ed. Ancher, Hafniæ, 1783).

[5] Christiani V. Jur. Danic. Lib. I. cap. xx. (Ed. Weghorst, Hafniæ, 1698). Senckenberg (Corp. Jur. German. T. I. Præf. p. lxxxvi.) gives the chapter

Among the kindred Frisians the tendency was the same. Their code of 1323 is a faithful transcript of the primitive Barbarian jurisprudence. It contains no allusions to torture, and as all crimes, except theft, were still compounded for with *wer-gilds*, it may reasonably be assumed that the extortion of confession was not recognized as a judicial expedient.[1]

So, in Sweden, the code of Ragnald, compiled in 1441, and in force until 1614, during a period in which torture flourished in almost every European state, has no place for it. Trials are conducted before twelve *nempdarii*, or jurymen, and in doubtful cases the accused is directed to clear himself by oath or by conjurators. For atrocious crimes the punishments are severe, such as the wheel or the stake, but inflictions like these are reserved for the condemned.[2] Into these distant regions the Roman jurisprudence penetrated slowly, and the jury trial was an elastic institution which adapted itself to all cases.

To the same causes may be attributed the absence of torture from the Common Law of England. In common with the other Barbarian races, the Anglo-Saxons solved all doubtful questions by the ordeal and wager of law, and in the collection known as the laws of Henry I. a principle is laid down which is incompatible with the whole theory of torture, whether used to extract confession or evidence. A confession obtained by fear or fraud is pronounced invalid, and no one who has confessed his own crime is to be believed with respect to that of another.[3] Such a principle, combined with the gradual

heads of a code in Danish, the *Keyser Retenn*, furnished to him by Ancher, in which cap. iv. and v. contain directions as to the administration of torture. The code is a mixture of German, civil, and local law, and probably was in force in some of the Germanic provinces of Denmark.

[1] Legg. Opstalbomicæ ann. 1323 (*ap.* Gärtner, Saxonum Leges Tres. Lipsiæ, 1730).

[2] Ragnald. Ingermund. Leg. Suecor. Stockholmiæ, 1623.

[3] Ll. Henrici I. cap. v. § 16.

A curious disregard of this principle occurs in the Welsh laws, which provide that when a thief is at the gallows, with the certainty of being

growth of the trial by jury, doubtless preserved the law from the contamination of inquisitorial procedure, though, as we have seen, torture was extensively employed for purposes of extortion by marauders and lawless nobles during periods of civil commotion. Glanville makes no allusion to it, and though Bracton shows a wide acquaintance with the revived Roman jurisprudence, and makes extensive use of it in all matters where it could be advantageously harmonized with existing institutions, he is careful to abstain from introducing torture into criminal procedure.[1] A clause in Magna Charta, indeed, has been held by high authority to inhibit the employment of torture, but it has no direct allusion to the subject, which was not a living question at the time, and was probably not thought of by any of the parties to that transaction.[2] In

hanged, his testimony as to his accomplices is to be received as sufficient without requiring it to be sworn to on a relic—the inseparable condition of all other evidence. By a singular inconsistency, however, the accomplice thus convicted was not to be hanged, but to be sold as a slave.—Dimetian Code, Bk. II. ch. v. § 9 (Owen I. 425).

[1] Many interesting details on the influence of the Roman law upon that of England will be found in the learned work of Carl Güterbock, "Bracton and his Relation to the Roman Law," recently translated by Brinton Coxe (Philadelphia, 1866). The subject is one which well deserves a more thorough consideration than it is likely to receive at the hands of English writers.

It is curious to observe that the *crimen læsæ majestatis* makes its appearance in Bracton (Lib. III. Tract. ii. cap. 3, § 1) about the middle of the thirteenth century, earlier than in France, where, as we have seen, the first allusion to it occurs in 1315. This was hardly to be expected, when we consider the widely different influences exerted upon the jurisprudence of the two countries by the Roman law.

[2] The passage which has been relied on by lawyers is chap. xxx.: "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." If the law just above quoted from the collection of Henry I. could be supposed to be still in force under John, then this might possibly be imagined to bear some reference to it; but it is evident that had torture been an existing grievance, such as outlawry, seizure, and imprisonment, the barons

fact, the whole spirit of English law was irreconcilable with the fundamental principles of the inquisitorial process. When the accused was brought before court, he was, it is true, required to appear ungirdled, without boots, or cap, or cloak, to show his humility, but it is expressly directed that he shall not be chained, lest his fetters should embarrass his self-possession in his defence, and he was not to be forced in any way to state anything but of his own free will.[1] Men who could frame legal maxims so honorable to their sense of justice and so far in advance of the received notions of their age could evidently have nothing in common with the principles which placed the main reliance of the law on confession to be wrung from the lips of an unfortunate wretch who was systematically deprived of all support and assistance. To do so, in fact, is classed with homicide, by a legal writer of the period;[2] but that it was occasionally practised is shown by his giving a form for the appeal of homicide against judges guilty of it.[3]

Under the common law, therefore, torture had properly no existence in England, and in spite of occasional efforts on the part of the Plantagenets[4] the character of the national

would have been careful to include it in their enumeration of restrictions. Moreover, Magna Charta was specially directed to curtail the royal prerogative, and at a later period was not held by any one to interfere with that prerogative whenever the king desired to test with the rack the endurance of his loving subjects.

[1] Et come ascuns felons viendrount en Jugement respondre de lour felonie, volons que ils viegnent dechausses et descients sauns coiffe, et a teste descouverte, en pure lour cote hors de fers et de chescun manere de liens, issint que la peine ne lour toille nule manere de rason, selon par force ne lour estouva mye respondre forsque lour fraunche volunte.—Britton, chap. v.

[2] Per volunté aussi se fait ceste pesché [homicide] si come per ceux qui painent home tant que il est gehist pur avouer pesché mortelment.—Horne, The Myrror of Justice, cap. I. sect. viii.—See also Fleta, Lib. I. cap. xxvi. § 5.

[3] Ou faussement judgea Raginald . . . . ou issint; tant luy penia pur luy faire conoistre, approver il se conoist faussement aver pesché ou nient ne pescha.—Horne, cap. II. sect. xv.

[4] Pike (Hist. of Crime in England I. 427) quotes a document of 1189 which seems indirectly to show that torture could be inflicted under an

institutions kept at bay the absorbing and centralizing influences of the Roman law.[1] Yet their wide acceptance in France, and their attractiveness to those who desired to wield absolute authority, gradually accustomed the crown and the crown lawyers to the idea that torture could be administered by order of the sovereign. Sir John Fortescue, who was Lord Chancellor under Henry VI., inveighs at great length against the French law for its cruel procedures, and with much satisfaction contrasts it with the English practice,[2] and yet he does not deny that torture was occasionally used in England. Indeed, his fervent arguments against the system, addressed to Prince Edward, indicate an anxiety to combat and resist the spread of civil law doctrines on the subject, which doubtless were favored by the influence of Margaret of Anjou. An instance of its application in 1468 has, in fact, been recorded, which resulted in the execution of Sir Thomas Coke, Lord Mayor of London;[3] and in 1485, Innocent VIII. remonstrated with Henry VII. respecting some proceedings against ecclesiastics who were scourged, tortured, and hanged.[4]

Under Henry VIII. and his children, the power of the crown was largely extended, and the doctrine became fashionable that, though under the law no one could be tortured for

order of the king. The expression is somewhat doubtful, and as torture had not yet established itself anywhere in Europe as a judicial procedure the document alleged can hardly be received as evidence of its legality.

[1] See Fortescue de Laud. Legg. Angliæ. cap. xxxiii.—The jealousy with which all attempted encroachments of the Roman law were repelled is manifested in a declaration of Parliament in 1388. "Que ce royalme d'Engleterre n'estait devant ces heures, ne à l'entent du roy nostre dit seignior et seigniors du parlement unque ne serra rulé ne governé par la ley civill."—Rot. Parl., 11 Ric. II. (Selden's Note to Fortescue, *loc. cit.*).

[2] De Laudibus Legum Angliæ, cap. xxii.

[3] See Jardine's "Reading on the Use of Torture in the Criminal Law of England," p. 7 (London, 1837), a condensed and sufficiently complete account of the subject under the Tudors and Stuarts.

[4] Partim tormentis subjecti, partim crudelissime laniati, et partim etiam furca suspensi fuerant.—Wilkins Concil. III. 617.

confession or evidence, yet outside and above the law the royal prerogative was supreme, and that a warrant from the King in Privy Council fully justified the use of the rack and the introduction of the secret inquisitorial process, with all its attendant cruelty and injustice. It is difficult to conceive the subserviency which could reconcile men, bred in the open and manly justice of the common law, to a system so subversive of all the principles in which they had been trained. Yet the loftiest names of the profession were concerned in transactions which they knew to be in contravention of the laws of the land.

Sir Thomas Smith, one of the ornaments of the Elizabethan bar, condemned the practice as not only illegal, but illogical. "Torment or question, which is used by order of the civile law and custome of other countries, ... is not used in England. . . . The nature of Englishmen is to neglect death, to abide no torment; and therefore hee will confesse rather to have done anything, yea, to have killed his owne father, than to suffer torment." And yet, a few years later, we find the same Sir Thomas writing to Lord Burghley, in 1571, respecting two miserable wretches whom he was engaged in racking under a warrant from Queen Elizabeth.[1]

In like manner, Sir Edward Coke, in his Institutes, declares—"So, as there is no law to warrant tortures in this land, nor can they be justified by any prescription, being so lately brought in." Yet, in 1603, there is a warrant addressed to Coke and Fleming, as Attorney and Solicitor General, directing them to apply torture to a servant of Lord Hundsdon, who had been guilty of some idle speeches respecting King James, and the resultant confession is in Coke's handwriting, showing that he personally superintended the examination.[2]

[1] Jardine, *op. cit.* pp. 8–9, 24–5. It is due to Sir Thomas to add that he earnestly begs Lord Burghley to release him from so uncongenial an employment.

[2] Ibid. pp. 8, 47.

Coke's great rival, Lord Bacon, was as subservient as his contemporaries. In 1619, while Chancellor, we find him writing to King James concerning a prisoner confined in the Tower on suspicion of treason—"If it may not be done otherwise, it is fit Peacock be put to torture. He deserveth it as well as Peacham did"—Peacham being an unfortunate parson in whose desk was found a MS. sermon, never preached, containing some unpalatable reflections on the royal prerogative, which the prerogative resented by putting him on the rack.[1]

As in other countries, so in England, when torture was once introduced, it rapidly broke the bounds which the prudence of the Roman lawgivers had established for it. Treason was a most elastic crime, as was shown in 1553 by its serving as an excuse for the torture of one Stonyng, a prisoner in the Marshalsea, because he had transcribed for the amusement of his fellow-captives a satirical description of Philip II., whose marriage with Queen Mary was then under contemplation.[2] But it was not only in cases of high treason that the royal prerogative was allowed to transgress the limits of the law. Matters of religion, indeed, in those times of perennial change, when dynasties depended on dogmas, might come under the comprehensive head of constructive treason, and be considered to justify the torture even of women, as in the instance of Ann Askew in 1546;[3] and of monks guilty of no other crime than the endeavor to preserve their monasteries by pretended miracles.[4] Under Elizabeth, engaged in a death-struggle with Rome, matters became even worse, and torture was habitually used on the unhappy Catholics who were thrown into the Tower. As the whole matter was with-

[1] Bacon's Works, Philadelphia, 1846, III. 126.

[2] Strype's Eccles. Memorials, III. 101.

[3] Burnet, Hist. Reform. Bk. III pp. 341–2.

[4] According to Nicander Nucius (Travels, Camden Soc. 1841, pp. 58, 62), the investigation of these deceptions with the severest tortures, *βασάνοις ἀφορήτοις*, was apparently the ordinary mode of procedure.

out the color of law, all legal limitations seem to have been disregarded. The Jesuit Campion was subjected to the rack no less than three times with extreme severity, and in the intervals was made to dispute with Protestant divines.[1] Having once thus secured its introduction in state trials for treason, the custom inevitably tended to spread to the sphere of the most ordinary criminal business. Suspicion of theft, murder, horse-stealing, embezzlement, and other similar offences was sufficient to consign the unfortunate accused to the tender mercies of the rack, the Scavenger's Daughter,[2] and the manacles, when the aggrieved person had influence enough to procure a royal warrant; nor were these proceedings confined to the secret dungeons of the Tower, for the records show that torture began to be habitually applied in the Bridewell. Jardine, however, states that this especially dangerous extension of the abuse appears to have ceased with the death of Elizabeth, and that no trace of the torture even of political prisoners can be found later than the year 1640.[3] The royal

[1] Diarium rerum gestarum in Turri Londinensi (Sanderi Schisma Angli canum, *ad calcem*, Ingolstadt, 1586).

[2] Sir William Skevington, a lieutenant of the Tower, under Henry VIII., immortalized himself by reviving an old implement of torture, consisting of an iron hoop, in which the prisoner was bent, heels to hams and chest to knees, and was thus crushed together unmercifully. It obtained the nickname of Skevington's Daughter, corrupted in time to Scavenger's Daughter. Among other sufferers from its embraces was an unlucky Irishman, named Myagh, whose plaint, engraved on the walls of his dungeon, is still among the curiosities of the Tower:—

"Thomas Miagh, which liethe here alone,
That fayne wold from hens begon:
By torture straunge mi truth was tryed,
Yet of my libertie denied.
1581. Thomas Myagh." (Jardine, *op. cit.* pp. 15, 30).

[3] Jardine, pp. 53, 57–8.

It is rather remarkable to find torture legalized at this period, even in qualified form of the *question définitive* in the Colony of Massachusetts. The Body of Liberties, enacted in 1641, declares:—

"45. No man shall be forced by Torture to confesse any crime against

prerogative had begun to be too severely questioned to render such manifestations of it prudent, and the Great Rebellion finally settled the constitutional rights of the subject on too secure a basis for even the time-serving statesmen of the Restoration to venture on a renewal of the former practice. Yet how nearly, at one time, it had come to be engrafted on the law of the land is evident from its being sufficiently recognized as a legal procedure for persons of noble blood to claim immunity from it, and for the judges to admit that claim as a special privilege. In the Countess of Shrewsbury's case, the judges, among whom was Sir Edward Coke, declared that there was a "privilege which the law gives for the honor and reverence of the nobility, that their bodies are not subject to torture *in causa criminis læsæ majestatis*," and no instance is on record to disprove the assertion.[1]

In one class of offences, however, torture was frequently used to a later date, and without requiring the royal intervention. As on the Continent, sorcery and witchcraft were regarded as crimes of such peculiar atrocity, and the dread they excited was so universal and intense, that those accused of them were practically placed beyond the pale of the law, and no means were considered too severe to secure the conviction which in many cases could only be obtained by confession. We have seen that among the refinements of Italian torture, the deprivation of sleep for forty hours was considered by the most experienced authorities on the subject to be second to none in severity and effectiveness. It neither lacerated the flesh, dis-

himselfe nor any other, unlesse it be in some Capitall case where he is first fully convicted by cleare and suffitient evidence to be guilty, After which if the case be of that nature, That it is very apparent there be other conspiritours or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane."—Whitmore's Colonial Laws of Massachusetts, Boston, 1889 (N. Y. Nation, No. 1268, p. 318).

From this it would appear safe to conclude that this is a limitation on a pre-existing, more general use of torture.

[1] Jardine, p. 65.

located the joints, nor broke the bones, and yet few things could be conceived as more likely to cloud the intellect, break down the will, and reduce the prisoner into a frame of mind in which he would be ready to admit anything that the questions of his examiners might suggest to him. In English witch-trials, this method of torture was not infrequently resorted to, without the limitation of time to which it was restricted by the more experienced jurists of Italy.[1]

Another form of torture used in Great Britain, which doubtless proved exceedingly efficacious, was the "pricking" adopted to discover the insensible spot, which, according to popular belief, was one of the invariable signs of a witch. There were even professional "prickers" who were called in as experts in the witch-trials, and who thrust long pins into the body of the accused until some result, either negative or positive, was obtained.[2] Thus at the prosecution of Janet Barker, in Edinburgh, in 1643, it is recorded that "she had the usual mark on the left shoulder, which enabled one James Scober, a skilful pricker of witches, to find her out by putting a large pin into it, which she never felt."[3] One witch pricker, named Kincaid, used to strip his victims, bind them hand and foot, and then thrust his pins into every part of their bodies, until, exhausted and rendered speechless by the torture, they failed to scream, when he would triumphantly proclaim that he had

[1] Lecky, Hist. of Rationalism, Am. ed. I. 122.—In his very interesting work, Mr. Lecky mentions a case, occurring under the Commonwealth, of an aged clergyman named Lowes, who, after an irreproachable pastorate of fifty years, fell under suspicion. "The unhappy old man was kept awake for several successive nights, and persecuted 'till he was weary of his life, and was scarcely sensible of what he said or did.' He was then thrown into the water, condemned, and hung."—Ibid. p. 126.

[2] Cobbett's State Trials, VI. 686.—Although ostensibly not used to extort confession, this pricking was practically regarded as a torture. Thus in 1677 the Privy Council of Scotland "found that they (*i. e.*, the inferior magistracy) might not use any torture by pricking or by withholding them from sleep" (*loc. cit.*).

[3] Spottiswoode Miscellany, Edinburgh, 1845, II. 67.

found the witch-mark. Another pricker confessed on the gallows that he had illegally caused the death of a hundred and twenty women whom he had thus pricked for witchcraft.[1]

In Scotland, torture, as a regular form of judicial investigation, was of late introduction. In the various codes collected by Skene, extending from an early period to the commencement of the fifteenth century, there is no allusion whatever to it. In the last of these codes, adopted under Robert III. by the Parliament of Scotland in 1400, the provisions respecting the wager of battle show that torture would have been superfluous as a means of supplementing deficient evidence.[2] The influence of the Roman law, however, though late in appearing, was eventually much more deeply felt in Scotland than in the sister kingdom, and consequently torture at length came to be regarded as an ordinary resource in doubtful cases. In the witch persecutions, especially, which in Scotland rivalled the worst excesses of the Inquisition of Italy and Spain, it was carried to a pitch of frightful cruelty which far transcended the limits assigned to it elsewhere. Thus the vigils, which we have seen consisted simply in keeping the accused awake for forty hours by the simplest modes, in Scotland were fearfully aggravated by a witch-bridle, a band of iron fastened around the face, with four diverging points thrust into the mouth. With this the accused was secured immovably to a wall, and cases are on record in which this insupportable torment was prolonged for five and even for nine days. In other cases an enormous weight of iron hoops and chains, amounting to twenty-five or thirty stone, would be accumulated on the body of the patient.[3] Indeed, it is difficult to believe that the accounts which have been preserved to us of these terrible scenes are not exaggerated. No cruelty is too great for the conscientious persecutor who believes that he is avenging his

[1] Rogers's Scotland, Social and Domestic, p. 266.

[2] Statut. Roberti III. cap. xvi. (Skene).

[3] Lecky, *op. cit.* I. 145-6.—Rogers, *op. cit.* pp. 267–300.

God, but the limitless capacity of human nature for inflicting is not complemented by a limitless capacity of endurance on the part of the victim; and well authenticated as the accounts of the Scottish witch-trials may be, they seem to transcend the possibility of human strength.[1] In another respect these witch-trials were marked with a peculiar atrocity. Elsewhere, as we have seen, confession was requisite for condemnation, thus affording some color of excuse for torture. In Scotland, however, the testimony of the pricker was sufficient, and torture thus became a wanton and cruel surplusage, rendered the less defensible in that the poor wretch who yielded to the torment and confessed was rewarded by being mercifully strangled before being burnt, while those who held out under torture were condemned and burnt alive.[2]

Torture thus maintained its place in the laws of Scotland as long as the kingdom preserved the right of self-legislation,

[1] I quote from Mr. Lecky (p. 147), who gives as his authority "Pitcairn's Criminal Trials of Scotland."

"But others and perhaps worse trials were in reserve. The three principal that were habitually applied were the penniwinkis, the boots, and the caschielawis. The first was a kind of thumbscrew; the second was a frame in which the leg was inserted, and in which it was broken by wedges driven in by a hammer; the third was also an iron frame for the leg, which was from time to time heated over a brazier. Fire matches were sometimes applied to the body of the victim. We read, in a contemporary legal register, of one man who was kept for forty-eight hours in 'vehement tortour' in the caschielawis; and of another who remained in the same frightful machine for eleven days and eleven nights, whose legs were broken daily for fourteen days in the boots, and who was so scourged that the whole skin was torn from his body." These cases occurred in 1596.

These horrors are almost equalled by those of another trial in which a Dr. Fian was accused of having caused the storms which endangered the voyage of James VI. from Denmark in 1590. James personally superintended the torturing of the unhappy wretch, and after exhausting all the torments known to the skill and experience of the executioners, he invented new ones. All were vain, however, and the victim was finally burnt without confessing his ill-deeds (Ibid. p. 123).

[2] Rogers, *op. cit.* p. 307.

though an attempt seems to have been made to repress it during the temporary union with England under the Commonwealth. In 1652, when the English Commissioners for the administration of justice sat in Edinburgh, among other criminals brought before them were two witches who had confessed their guilt before the Kirk. They were the remains of a party of six, four of whom had died under the tortures employed to procure confession—such as hanging by the thumbs tied behind the back, scourging, burning the feet and head and putting lighted candles into their mouths, clothing them in hair-cloth soaked in vinegar "to fetch off the skin," &c. Another woman was stripped naked, laid on a cold stone with a hair-cloth over her, and thus kept for twenty-eight days and nights, being fed on bread and water. The diarist who records this adds that "The judges are resolved to inquire into the business, and have appointed the sheriff, ministers, and tormentors to be found out, and to have an account of the ground of this cruelty."[1] What result their humane efforts obtained in this particular instance I have not been able to ascertain, but the legal administration of torture was not abolished until after the Union, when, in 1709, the United Parliament made haste, at its second session, to pass an act for "improving the Union," by which it was done away with.[2] Yet the spirit which had led to its

[1] Diurnal of Occurrences in Scotland (Spottiswoode Miscellany, II. 90–91).

[2] 7 Anne c. 21.—While thus legislating for the enlightenment of Scotland, the English majority took care to retain the equally barbarous practice of the *peine forte et dure*. This was commenced in 1275 simply as a "prisone forte et dure" (First Statute of Westminster, cap. xii.; Cf. Britton, cap. xi.) for felons refusing to plead, and speedily developed into starvation and nakedness (Fleta, Lib. I. cap. xxxii. § 33). Horne (Myrror of Justice, cap. I. § viii.; cap. II. § ix.) evidently regards as illegal "le horrible et perillous lien," and treats as murder a death occasioned by it. In spite of this protest the process was rendered still more barbarous by piling weights of iron on the poor wretch, and finally the device of a press was adopted in which he was squeezed. In this shape it lost its original justification of

abuse could not be repressed by Act of Parliament, and a case is on record, occurring in 1722, when a poor old woman in her dotage, condemned to be burnt as a witch, actually warmed her withered hands at the stake lighted for her destruction, and mumbled out her gladness at enjoying the unaccustomed warmth.[1]

CHAPTER X.

DECLINE OF THE TORTURE SYSTEM.

A SYSTEM of procedure which entailed results so deplorable as those which we have seen accompany it everywhere, could scarcely fail to arouse the opposition of thinking men who were not swayed by reverence for precedent or carried away by popular impulses. Accordingly, an occasional voice was raised in denunciation of the use of torture. Geiler von Kaisersberg, the most popular preacher of his time in Germany, who died in 1510, endeavored to procure its disuse, as well as to mitigate

wearing out his endurance and forcing him to plead either guilty or not guilty, and became a simple punishment of peculiar atrocity, for, after its commencement the prisoner was not allowed to plead, but was kept under the press until death, "donec oneris, frigoris atque famis cruciatu extinguitur" (Hale, Placit. Coron. c. xliii.). This relic of modern barbarism was not abolished until 1772, by 12 Geo. III. c. 20. The only case of its employment in America is said to have been that of Giles Cory, in 1692, during the witchcraft epidemic. Knowing the hopelessness of the trials, he refused to plead, and was duly pressed to death (Cobbett's State Trials, VI. 680).

When the *peine forte et dure* had become simply a punishment, it was sometimes replaced by a torture consisting of tying the thumbs together with whipcord until the endurance of the accused gave way and he consented to plead. This practice continued at least until so late as 1734. See an interesting essay by Prof. James B. Thayer, Harvard Law Review, Jan. 1892.

[1] Rogers, *op. cit.* p. 301.

the cruelties practised upon prisoners.[1] The Spaniard, Juan Luis Vives, one of the profoundest scholars of the sixteenth century, condemned it as useless and inhuman.[2] The sceptic of the period, Montaigne, was too cool and clear-headed not to appreciate the vicious principle on which it was based, and he did not hesitate to stamp it with his reprobation. "To tell the truth, it is a means full of uncertainty and danger; what would we not say, what would we not do to escape suffering so poignant? whence it happens that when a judge tortures a prisoner for the purpose of not putting an innocent man to death, he puts him to death both innocent and tortured. . . . . Are you not unjust when, to save him from being killed, you do worse than kill him?"[3] In 1624, the learned Johann Gräfe, in his *Tribunal Reformatum*, argued forcibly in favor of its abolition, having had, it is said, practical experience of its horrors during his persecution for Arminianism by the Calvinists of Holland, and his book attracted sufficient attention to be repeatedly reprinted.[4] Friedrich Keller, in 1657, at the University of Strassburg, presented a well-reasoned thesis urging its disuse, which was reprinted in 1688, although the title which he prefixed to it shows that he scarce dared to assume the responsibility for its unpopular doctrines.[5] When the French Ordonnance of 1670 was in preparation, various magistrates of the highest character and largest experience

[1] Herzog, Abriss der Gesammten Kirchengeschichte, II. 346.

[2] His arguments are quoted and controverted by Simancas, Bishop of Badajos, in his Cathol. Institut. Tit. LXV. No. 7, 8.

[3] Essais, Liv. II. chap. v.—This passage is little more than a plagiarism on St. Augustin, de Civ. Dei Lib. XIX. cap. vi.—Montaigne further illustrates his position by a story from Froissart (Liv. IV. ch. lviii.), who relates that an old woman complained to Bajazet that a soldier had foraged on her. The Turk summarily disposed of the soldier's denial by causing his stomach to be opened. He proved guilty—but what had he been found innocent?

[4] Bayle, Dict. Hist. s. v. *Grevius*.—Gerstlacheri Comment. de Quæst. per Torment. Francof. 1753, pp. 25–6.

[5] Frid. Kelleri Paradoxon de Tortura in Christ. Repub. non exercenda. Reimp. Jenæ, 1688.

gave it as their fixed opinion that torture was useless, that it rarely succeeded in eliciting the truth from the accused, and that it ought to be abolished.[1] Towards the close of the century, various writers took up the question. The best known of these was perhaps Augustin Nicolas, who has been frequently referred to above, and who argued with more zeal and learning than skill against the whole system, but especially against it as applied in cases of witchcraft.[2] In 1692, von Boden, in a work alluded to in the preceding pages, inveighed against its abuses, while admitting its utility in many classes of crimes. Bayle, not long after, in his Dictionary, condemned it in his usual indirect and suggestive manner.[3] In 1705, at the University of Halle, Martin Bernhardi of Pomerania, a candidate for the doctorate, in his inaugural thesis, argued with much vigor in favor of abolishing it, and the dean of the faculty, Christian Thomas, acknowledged the validity of his reasoning, though expressing doubts as to the practicability of a sudden reform. Bernhardi states that in his time it was no longer employed in Holland, and its disuse in Utrecht he attributes to a case in which a thief procured the execution, after due torture and confession, of a shoemaker, against whom he had brought a false charge in revenge for the refusal of a pair of boots.[4] His assertion, however, is too general, for it was not until the formation of

[1] Déclaration du 24 Août, 1780 (Isambert, XXVII. 374).

[2] Nicolas is careful to assert his entire belief in the existence of sorcery and his sincere desire for its punishment, and he is indignant at the popular feeling which stigmatized those who wished for a reform in procedure as "avocats des sorciers."

[3] Dict. Histor. s. v. *Grevius*.

[4] Bernhardi Diss. Inaug. cap. II. §§ iv. x.—Bernhardi ventured on the use of very decided language in denunciation of the system.—"Injustam, iniquam, fallacem, insignium malorum promotricem, et denique omni divini testimonii specie destitutam esse hanc violentam torturam et proinde ex foris Christianorum rejiciendam intrepide assero" (Ibid. cap. I. § 1).

the Republic of the Netherlands, in 1798, that it was formally abolished.[1]

These efforts had little effect, but they manifest the progress of enlightenment, and doubtless paved the way for change, especially in the Prussian territories. Yet, in 1730, we find the learned Baron Senckenberg reproducing Zanger's treatise, not as an archæological curiosity, but as a practical text-book for the guidance of lawyers and judges. Meanwhile the propriety of the system continued to be a subject of discussion in the schools, with ample expenditure of learning on both sides.[2] In 1733, at Leipzig, Moritz August Engel read a thesis, which called forth much applause, in which he undertook to defend the use of torture against the dictum of Christian Thomas nearly thirty years before.[3] The argument employed is based on the theory of the criminal jurisprudence of the time, in which the guilt of the accused is taken for granted and the burden thrown upon him of proving himself innocent. Engel declares that in all well-ordered States torture is rightfully employed; those who are innocent and are the victims of suspicious circumstances have only themselves to blame for their imprudence, and must make allowance for the imperfections of human reason; and he airily disposes of the injustice of the system by declaring that the State need not care if an innocent man is occasionally tortured, for no human ordinance can be expected to be free from occasional drawbacks. Another disputant on the same side meets the argument that the differ-

[1] Meyer, Institutions Judiciaires, IV. 297. Even, then, however, the inquisitorial process was not abolished, and criminal procedure continued to be secret. For the rack and strappado were substituted prolonged imprisonment and other expedients to extort confession; and in 1803 direct torture was used in the case of Hendrik Janssen, executed in Amsterdam on the strength of a confession extracted from him with the aid of a bull's pizzle.

[2] An enumeration of the opponents of torture may be found in Gerstlacher's Comment. de Quæst. per Tormenta, pp. 24–30, and Werner's Dissert. de Tortura Testium, pp. 28–31.

[3] M. A. Engel de Tortura ex Foris Christ. non proscribenda. Lipsiæ, 1733.

ent sensibilities of individuals rendered torture uncertain, by boasting that in the Duchy of Zerbst the executioner had invented an instrument which would wring a confession out of the most hardened and robust.[1] It was shortly after this, however, that the process of reform began in earnest. Frederic the Great succeeded to the throne of Prussia May 31, 1740. Few of his projects of universal philanthropy and philosophical regeneration of human nature survived the hardening experiences of royal ambition, but while his power was yet in its first bloom he made haste to get rid of this relic of unreasoning cruelty. It was almost his earliest official act, for the cabinet order abolishing torture is dated June 3d.[2] Yet even Frederic could not absolutely shake off the traditional belief in its necessity when the safety of the State or of the head of the State was concerned. Treason and rebellion and some other atrocious crimes were excepted from the reform; and in 1752, at the instance of his high chancellor, Cocceji, by a special rescript, he ordered two citizens of Oschersleben to be tortured on suspicion of robbery.[3] With singular inconsistency, moreover, torture in a modified form was long permitted in Prussia, not precisely as a means of investigation, but as a sort of punishment for obdurate prisoners who would not confess, and as a means of marking them for subsequent recognition.[4] It is evident that the abrogation of torture did not carry with it the removal of the evils of the inquisitorial process.

When the royal philosopher of Europe thus halted in the reform, it is not singular that his example did not put an end to the controversy as to the abolition of torture elsewhere. German jurisprudence, in fact, was not provided with substi-

[1] Jo. Frid. Werner Dissert. de Tortura Testium, Erford. 1724. Reimpr. Lipsiæ, 1742.

[2] Carlyle, Hist. Friedrich II. Book XI. ch. i.

[3] I find this statement in an account by G. F. Günther (Lipsiæ, 1838) of the abolition of torture in Saxony.

[4] Günther, *op. cit.*

tutes, and legists trained in the inquisitorial process might well hesitate to abandon a system with which they were familiar in order to enter upon a region of untried experiment for which there was no provision in the institutions or the ancestral customs of the land. These natural doubts are well expressed by Gerstlacher, who, in 1753, published a temperate and argumentative defence of torture. He enumerates the substitutes which had been proposed by his opponents, and if he does them no injustice, the judges of the day might naturally feel indisposed to experiments so crude and illogical. It seems that the alternatives offered for the decision of cases in which the accused could not be convicted by external evidence reduced themselves to four—to dismiss him without a sentence either of acquittal or conviction, to make him take an oath of purgation, to give him an extraordinary (that is to say, a less) penalty than that provided for the crime, and, lastly, to imprison him or send him to the galleys or other hard labor, proportioned to the degree of the evidence against him, until he should confess.[1]

In Saxony, as early as 1714, an Electoral Rescript had restricted jurisdiction over torture to the magistrates of Leipzig, to whom all proceedings in criminal prosecutions had to be submitted for examination prior to their confirmation of the decision of the local tribunals to employ it.[2] This must have greatly reduced the amount of wrong and suffering caused by the system, and thus modified it continued to exist until, in the remodelling of the Saxon criminal law, between 1770 and 1783, the whole apparatus of torture was swept away. In Austria the *Constitutio Criminalis Theresiana*, issued in 1769 by Maria Theresa, still contains elaborate instructions as to the administration of torture, with careful descriptions and illustrations of the implements in use and the methods of em-

[1] Gerstlacheri Comment. de Quæst. per Tormenta, Francofurti, 1753, p. 56.

[2] Goetzii Dissert. de Tortura, Lipsiæ, 1742, p. 24.

ploying them ;[1] but the enlightenment of Joseph II., soon after his accession in 1780, put an end to the barbarism, and in Switzerland about the same time it was similarly disused. In Russia, the Empress Catherine, in 1762, removed it from the jurisdiction of the inferior courts, where it had been greatly abused ; in 1767, by a secret order, it was restricted to cases in which the confession of the accused proved actually indispensable, and even in these it was only permitted under the special command of governors of provinces.[2] In the singularly enlightened instructions which she drew up for the framing of a new code in 1767, the use of torture was earnestly argued against in a manner which betrays the influence of Beccaria.[3] Under these auspices it soon became almost obsolete, and it was finally abolished in 1801. Yet, in some of the States of central Europe, the progress of enlightenment was wonderfully slow. Torture continued to disgrace the jurisprudence of Würtemberg and Bavaria until 1806 and 1807. Though the wars of Napoleon abolished it temporarily in other States, on his fall in 1814 it was actually restored. In 1819, however, George IV. consented, at the request of his subjects, to dispense with it in Hanover ; while in Baden it continued to exist until 1831. Yet legists who had been trained in the old school could not admit the soundness of modern ideas, and in the greater part of Germany the theories which resulted in the use of torture continued to prevail. The secret inquisitorial process was retained and the principle that the confession of the accused was requisite to his condemnation. Torture of some kind is necessary to render the practical application of this system efficacious, and accordingly, though the rack and strappado were abolished, their place was taken

[1] Constitutio Criminalis Theresiana, Wien, 1769.

[2] Du Boys, Droit Criminel des Peuples Modernes, I. 620.

[3] Instructions addressées par sa Majesté l'Impératrice de toutes les Russies à la Commission établie pour travailler à l'exécution du projet d'un Nouveau Code de Lois Art. x. §§ 82–87 (Pétersbourg 1769).—See also Grand Instructions of Catherine II., London, 1769, pp. 113–8.

by other modes in reality not less cruel. When appearances were against the prisoner, he was confined for an indefinite period and subjected to all the hard usage to be expected from officials provoked by his criminal obstinacy. He was brought up repeatedly before his judge and exposed to the most searching interrogatories and terrified with threats. Legists, unwilling to abandon the powerful weapon which had placed every accused person at their mercy, imagined a new justification for its revival. It was held that every criminal owed to society a full and free confession. His refusal to do this was a crime, so that if his answers were unsatisfactory to the judge the latter could punish him on the spot for contumacy. As this punishment was usually administered with the scourge, it will be seen that the abolition of torture was illusory, and that the worst abuses to which it gave rise were carefully retained.[1] Indeed, if we are to accept literally some letters of M. A. Eubule-Evans in the London "Times" of 1872, the *Untersuchungschaft* or inquisitorial process as employed in Prussia to the present day lacks little of the worst abuses recorded by Sprenger and Bodin. The accused while under detention is subjected to both physical and moral torture, and is carefully watched by spies. In the prison of Bruchsal there is a machine to which the prisoner is attached by leather thongs passed around head, trunk, and limbs, and drawn so tight that the arrested circulation forces the blood from mouth and ears; or he is confined, perhaps for a week at a time, in a small cell of which floor and sides are covered with sharp wooden wedges, rivalling the fragments of potsherds which Prudentius considered the crowning effort of devilish ingenuity for the torture of Christian martyrs.

Spain, as may readily be imagined, was in no haste to reform the ancient system of procedure. As late as 1796, in the Vice-royalty of New Granada, when the spread of the

[1] Jardine, Use of Torture in England, p. 3.—Meyer, Institutions Judiciaires, T. I. p. xlvi.—T. II. p. 262.

ideas of the French Revolution began to infect society, some pasquinades appeared in Santafé displeasing to the government. Though the Viceroy Ezpeleta was regarded as a singularly enlightened man, he had a number of persons arrested on suspicion, one of whom was put to the torture to discover the author of the obnoxious epigrams. It is satisfactory to know that although several of the accused were convicted and sent to Spain to serve out long terms of punishment, on their arrival at Madrid they were all discharged and compensated.[1] After the revolution, the authorized use of torture was abolished, but as recently as 1879 its application, by various methods showing skill and experience in its use, on an American citizen falsely accused of theft, led to a correspondence between the governments of Venezuela and the United States, recorded in the journals of the time.

In the mother country the employment of torture, though becoming rarer as the eighteenth century neared its end, continued legal until the overthrow of the old monarchy, and it was not abolished until the Córtes of Cadiz in 1811 revolutionized all the institutions of the nation. In the reaction which followed the return of the Bourbons it was not reinstated, but moderated appliances known as *apremios*—which were sometimes as severe as the rack or the pulley—continued to be used, especially in political offences, by the arbitrary despotism of the Restoration.[2]

Even France had maintained a conservatism which may seem surprising in that centre of the philosophic speculation of the eighteenth century. Her leading writers had not hesitated to condemn the use of torture. In the *Esprit des Lois*, in 1748, Montesquieu stamped his reprobation on the system with a quiet significance which showed that he had on his side all the great thinkers of the age, and that he felt argument to be

[1] Groot, Hist. Ecles. y Civil de Nueva Granada II. 79-80.

[2] Toreno, Levantamiento, Guerra y Revolución de España, Paris, 1838, II. 371, 438.

mere surplusage.[1] Voltaire did not allow its absurdities and incongruities to escape. In 1765 he endeavored to arouse public opinion on the case of the Chevalier de la Barre, a youthful officer only twenty years of age, who was tortured and executed on an accusation of having recited a song insulting to Mary Magdalen and of having mutilated with his sword a wooden crucifix on the bridge of Abbeville.[2] He was more successful in attracting the attention of all Europe to the celebrated *affaire Calas* which, in 1761, had furnished a notable example of the useless cruelty of the system. In that year, at midnight of Oct. 13th, at Toulouse, the body of Marc-Antoine Calas was found strangled in the back shop of his father. The family were Protestants and the murdered man had given signs of conversion to Catholicism, in imitation of his younger brother. A minute investigation left scarcely a doubt that the murder had been committed by the father, from religious motives, and he was condemned to death. He appealed to the Parlement of Toulouse, which after a patient hearing sentenced him to the wheel, and to the *question ordinaire et extraordinaire*, to extract a confession. He underwent the extremity of torture and the hideous punishment of being broken alive without varying from his protestations of innocence. Though both trials appear to have been conducted with rigorous impartiality, the Protestantism of Europe saw in the affair the evidence of religious persecution, and a fearful outcry was raised. Voltaire, ever on the watch for means to promote toleration and freedom of thought, seized hold of it with tireless energy, and created so strong an agitation on the subject that in 1764 the supreme tribunal at Paris reversed the

[1] Tant d'habiles gens et tant de beaux génies ont écrit contre cette pra tique que je n'ose parler après eux. J'allois dire qu'elle pourroit convenir dans les gouvernements despotiques; où tout qui inspire la crainte entre plus dans les ressorts du gouvernement: j'allois dire que les esclaves, chez les Grecs et chez les Romains——Mais j'entends la voix de la nature qui crie contre moi.—Liv. VI. ch. xvii.

[2] Desmaze, Pénalités Anciennes, Pièces Justicatives p. 423.

sentence, discharged the other members of the family, who had been subjected to various punishments, and rehabilitated the memory of Calas.[1] When Louis XVI., at the opening of his reign, proposed to introduce many long-needed reforms, Voltaire took advantage of the occasion to address to him in 1777 an earnest request to include among them the disuse of torture;[2] yet it was not until 1780 that the *question préparatoire* was abolished by a royal edict which, in a few weighty lines, indicated that only the reverence for traditional usage had preserved it so long.[3] This edict, however, was not strictly obeyed, and cases of the use of torture still occasionally occurred, as that of Marie Tison at Rouen, in 1788, accused of the murder of her husband, when thumb-screws were applied to both thumbs and at the same time she was hoisted in the strappado, in which she was allowed to hang for an hour after the executioner had reported that both shoulders were out of joint, all of which was insufficient to extract a confession.[4] There evidently was occasion for another ordonnance, which in that same year, 1788, was promulgated in order to insure the observance of the previous one.[5] In fact, when the States-General was convened in 1879, the *cahier des doléances* of Valenciennes contained a prayer for the abolition of torture, showing that it had not as yet been discontinued there.[6] The *question définitive* or *préalable*, by which the prisoner after condemnation was again tortured to discover his accomplices, still remained

[1] Mary Lafon, Histoire du Midi de la France, T. IV. pp. 325–355.— The theory of the defence was that the murdered man had committed suicïde; but this is incompatible with the testimony, much of which is given at length by Mary Lafon, a writer who cannot be accused of any leanings against Protestantism.

[2] Chéruel, Dict. Hist. des Institutions de la France. P. II. p. 1220.

[3] Déclaration du 24 Août 1780 (Isambert, XXVII. 373).

[4] Desmaze, Pénalités Anciennes, pp. 176–77.

[5] Déclaration du 3 Mai 1788, art. 8. "Nôtre déclaration du 24 Août sera exécutée" (Isambert, XXIX. 532).

[6] Louïse, Sorcellerie et Justice Criminelle à Valenciennes, p. 96.

until 1788, when it, too, was abolished, at least temporarily. It was pronounced uncertain, cruel to the convict and perplexing to the judge, and, above all, dangerous to the innocent whom the prisoner might name in the extremity of his agony to procure its cessation, and whom he would persist in accusing to preserve himself from its repetition. Yet, with strange inconsistency, the abolition of this cruel wrong was only provisional, and its restoration was threatened in a few years, if the tribunals should deem it necessary.[1] When those few short years came around they dawned on a new France, from which the old systems had been swept away as by the besom of destruction; and torture as an element of criminal jurisprudence was a thing of the past. By the decree of October 9th, 1789, it was abolished forever.

In Italy, Beccaria, in 1764, took occasion to devote a few pages of his treatise on crimes and punishments to the subject of torture, and its illogical cruelty could not well be exposed with more terseness and force.[2] It was probably due to the movement excited by this work that in 1786 torture was formally abolished in Tuscany. In this the enlightened Grand-duke Leopold was in advance of his time, and the despots

[1] Isambert, XXIX. 529.—It is noteworthy, as a sign of the temper of the times, on the eve of the last convocation of the Notables, that this edict, which introduced various ameliorations in criminal procedure, and promised a more thorough reform, invites from the community at large suggestions on the subject, in order that the reform may embody the results of public opinion—"Nous élèverons ainsi au rang des lois les résultats de l'opinion publique." This was pure democratic republicanism in an irregular form.

The edict also indicates an intention to remove another of the blots on the criminal procedure of the age, in a vague promise to allow the prisoner the privilege of counsel.

[2] Dei Delitti e delle Pene, § XII.—The fundamental error in the prevalent system of criminal procedure was well exposed in Beccaria's remark that a mathematician would be better than a legist for the solution of the essential problem in criminal trials—"Data la forza dei muscoli e la sensibilitá delle fibre di un innocente, trovare il grado di dolore che lo farà confessar reo di un dato delitto."

who ruled the divided fractions of the peninsula, although they might be willing to banish torture from ordinary criminal jurisprudence, had too well-grounded a distrust of the fidelity of their subjects to divest themselves of this resource in the suppression of political offences. Hardly had the Bourbons, after the overthrow of Napoleon, been reseated on the throne of the Two Sicilies when the restless dissatisfaction of the people seemed to justify the severest measures for the maintenance of so-called order. The troubles of 1820 led to arming the police with exceptional and summary jurisdiction, under which it deemed itself authorized to employ any methods requisite to detect and punish conspirators. This continued until the revolution of 1848 aggravated the fears of absolutism, and from its suppression until the expedition of Garibaldi the régime of the Neapolitan dominions was an organized Terror. Grave as we have seen were the abuses of torture when systematized in the detection of crime, they were outstripped by the licensed cruelty of the ex-galley slaves of the Neapolitan police, who were restrained by no codes or rules of practice, and were eager to demonstrate their zeal by the number of their victims. The terrible secrets of the dungeons of Naples and Palermo may never see the light, but enough is known to show that they rivalled those of Ezzelin da Romano. Police agents competed in inventing new and hideous modes of inflicting pain. Neither age nor sex was spared. In one case an old man and his daughter, five months gone in pregnancy, died under the lash. If a suspected man took alarm and fled, his mother or his wife and daughters would be tortured to discover his hiding-place. The evil records of the dark ages have nothing to show more brutal and inhuman than the application of torture in Naples and Sicily in the second half of the nineteenth century.[1]

That the mortal duel between autocracy and Nihilism in Russia should lead to the employment of torture in unravelling

[1] Carlo di la Varenne, La Tortura in Sicilia, 1860.

the desperate conspiracies of the malcontents is so natural that we may readily accept the current assertions of the fact. The conspirators are said frequently to carry poison in order, if arrested, to save themselves from endless torment and the risk of being forced to betray associates, and the friends of prisoners spare no effort to convey to them some deadly drug by means of which they may escape the infliction. Polish aspirations for liberty are repressed in the same manner, and in 1890 the journals recorded the case of Ladislas Guisbert, rendered insane by the prolonged administration of Marsigli's favorite torment of sleeplessness.

So long as human nature retains its imperfections the baffled impatience of the strong will be apt to wreak its vengeance on the weak and defenceless. As recently as 1867, in Texas, the Jefferson "Times" records a case in which, under the auspices of the military authorities, torture was applied to two negroes suspected of purloining a considerable amount of money which had been lost by a revenue collector. More recently still, in September, 1868, the London journals report fearful barbarities perpetrated by the Postmaster-General of Roumania to trace the authors of a mail robbery. A woman was hung to a beam with hot eggs under the armpits; others were burned with grease and petroleum, while others again were tied by the hair to horses' tails and dragged through thorn bushes. It must be added that the offending officials were promptly dismissed and committed for trial. A still more recent case is one which has been the subject of legislative discussion in Switzerland, where it appears that in the Canton of Zug, under order of court, a man suspected of theft was put on bread and water from Oct. 26th to Nov. 10th, 1869, to extort confession, and when this failed he was subjected to thumb-screws and beaten with rods.

In casting a retrospective glance over this long history of cruelty and injustice, it is saddening to observe that Christian communities, where the truths of the Gospel were received

with unquestioning veneration, systematized the administration of torture with a cold-blooded ferocity unknown to the legislation of the heathen nations whence they derived it. The careful restrictions and safeguards, with which the Roman jurisprudence sought to protect the interests of the accused, contrast strangely with the reckless disregard of every principle of justice which sullies the criminal procedure of Europe from the thirteenth to the nineteenth century. From this no race or religion has been exempt. What the Calvinist suffered in Flanders, he inflicted in Holland; what the Catholic enforced in Italy, he endured in England; nor did either of them deem that he was forfeiting his share in the Divine Evangel of peace on earth and goodwill to men.

The mysteries of the human conscience and of human motives are well-nigh inscrutable, and it may seem shocking to assert that these centuries of unmitigated wrong are indirectly traceable to that religion of which the second great commandment was that man should love his neighbor as himself. Yet so it was. The first commandment, to love God with all our heart, when perverted by superstition, gave a strange direction to the teachings of Christ. For ages, the assumptions of an infallible Church had led men to believe that the interpreter was superior to Scripture. Every expounder of the holy text felt in his inmost heart that he alone, with his fellows, worshipped God as God desired to be worshipped, and that every ritual but his own was an insult to the Divine nature. Outside of his own communion there was no escape from eternal perdition, and the fervor of religious conviction thus made persecution a duty to God and man. This led the Inquisition, as we have seen, to perfect a system of which the iniquity was complete. Thus commended, that system became part and parcel of secular law, and when the Reformation arose the habits of thought which ages had consolidated were universal. The boldest Reformers who shook off the yoke of Rome, as soon as they had attained power, had as little scruple as Rome itself in rendering obligatory

their interpretation of divine truth, and in applying to secular as well as to religious affairs the cruel maxims in which they had been educated.

Yet, in the general enlightenment which caused and accompanied the Reformation, there passed away gradually the passions which had created the rigid institutions of the Middle Ages. Those institutions had fulfilled their mission, and the savage tribes that had broken down the worn-out civilization of Rome were at last becoming fitted for a higher civilization than the world had yet seen, wherein the precepts of the Gospel might at length find practical expression and realization. For the first time in the history of man the universal love and charity which lie at the foundation of Christianity are recognized as the elements on which human society should be based. Weak and erring as we are, and still far distant from the ideal of the Saviour, yet are we approaching it, even if our steps are painful and hesitating. In the slow evolution of the centuries, it is only by comparing distant periods that we can mark our progress; but progress nevertheless exists, and future generations, perhaps, may be able to emancipate themselves wholly from the cruel and arbitrary domination of superstition and force.

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